No. 89-1242

IN THE

Supreme Court of the United States

October Term, 1989

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,

Petitioners,

against

UNITED STATES CATHOLIC CONFERENCE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Do the petitioners, as secular charitable organizations tax-exempt under §§ 501(c)(3) or (4) of the Internal Revenue Code, as voters and diverse participants in the political process, as competitive advocates, as clergy members or as taxpayers, have standing to challenge the government's knowing refusal to enforce the anti-electioneering prohibition of § 501(c)(3) against a § 501(c)(3) religious organization that openly participates in political campaigns, when the effect of the government's refusal is to subsidize the political activities of a competitor of petitioners and to deny that subsidy to petitioners?

PARTIES TO THE PROCEEDING

The petitioners, who are plaintiffs below, are Abortion Rights Mobilization, Inc., Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau Inc., Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow, and Susan Sherer.*

The respondents, who are non-party witnesses and appellants below, are United

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* **Rule 29.1 Statement Regarding Petitioners:** There are no corporate parents, subsidiaries (other than wholly owned subsidiaries) or affiliates of the corporate petitioners listed above.

States Catholic Conference and National Conference of Catholic Bishops.

The respondents, who are defendants below, are Secretary of the Treasury Nicholas F. Brady and Commissioner of Internal Revenue Fred T. Goldberg.

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Abortion Rights Mobilization, Inc. ("ARM"), et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (1a - 33a) is reported at 885 F.2d 1020 (2d Cir. 1989). The opinions of the

district court (35a - 73a and 75a - 84a) are reported at 544 F.Supp. 471 (S.D.N.Y. 1982), and 603 F.Supp. 970 (S.D.N.Y. 1985), respectively.

JURISDICTION

The judgment of the court of appeals reversing the district court's denial of motions to dismiss was entered on September 6, 1989. A timely petition for rehearing was denied on October 4, 1989. (85a - 86a) (Petitioners' suggestion for rehearing en banc was denied on November 13, 1989.) By order of Justice Marshall, dated December 19, 1989, petitioners' time for filing a petition for certiorari was extended to February 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the

Constitution provides in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . to controversies to which the United States shall be a party; . . . .

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

Section 501 of the Internal Revenue Code, 26 U.S.C. § 501, provides in pertinent part:

> (a) Exemption from taxation.- An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503. . .
>
> (c) List of exempt organizations.- The following organizations are referred to in subsection (a): . . .
>
> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public

> safety, literary, or educational purposes, . . . , no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.
> . . .

STATEMENT OF THE CASE

This case and the question raised in this petition were before the Court two years ago. (No. 87-416) At that time, the then petitioners and now respondents, United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB"), having been held in contempt by the district court for the Southern District of New York for refusing to produce documents, sought review of the court of appeals' affirmance of the

contempt order.

Two questions were raised in the USCC/NCCB certiorari petition: could a non-party witness held in contempt of court challenge the subject matter jurisdiction of the district court over the underlying action on the witness' appeal from the contempt order, and, if so, did the plaintiffs (the petitioners herein) have standing under Article III to challenge the Internal Revenue Service's enforcement of a provision of the tax code?

This Court ruled on the first question, holding that non-party witnesses held in contempt had the right to challenge the subject matter jurisdiction of the underlying complaint, and remanded the case to the court of appeals for a determination of plaintiffs' standing. 487 U.S. 72 (1988).

On remand, a divided court of appeals held that none of the plaintiffs had standing under any of the theories advanced by plaintiffs or considered by the court and dismissed the action -- nine years after the original complaint had been filed. Because the court of appeals' decision is in conflict with decisions of this Court and with another decision of the Second Circuit, and is premised upon a fundamental misapplication of separation of powers principles, plaintiffs petition this Court to decide the question it left unresolved two years ago.

Proceedings Below

For at least sixty years it has been settled public policy that the tax code shall not be used to subsidize the political activities of charitable organizations. Slee v. Commissioner, 42 F.2d 184, 185 (2d Cir. 1930) (L. Hand,

J.). The particular provision involved in this case dates from the 1954 revision of the tax code when Congress amended 26 U.S.C. § 501(c)(3) to prohibit the granting of tax-exempt status to religious and other charitable organizations that "participate . . . or intervene" in any way in political campaigns for or against candidates for public office.

The premise of petitioners' complaint is that the will of Congress and the mandate of the Constitution have been frustrated by the government respondents (defendants, the Secretary of the Treasury and the Commissioner of Internal Revenue) who have refused to enforce this provision of the tax code against the Roman Catholic Church in the United States. By exempting one particular religious organization politically active in the abortion rights debate from the strictures of § 501(c)(3),

but not others, including petitioners, the government has effectively granted a preference in the form of a tax subsidy to the preferred group, to the disadvantage of petitioners who are competitors in the abortion rights debate. Petitioners filed this action to end the government's unconstitutional favoritism toward one religion over others and the resulting unconstitutional distortion of the political process.

The amended complaint alleges, in brief, that the Catholic Church, in violation of the clear language and intent of the anti-electioneering provision of § 501(c)(3), has engaged in a persistent and regular pattern of intervening in elections nationwide and locally in favor of candidates who support the Church's position on abortion and in opposition to

candidates with opposing views.[1]

The government respondents, despite their knowledge of the Church's -- often highly publicized -- activities detailed in the amended complaint, have done nothing to enforce the law against such violations. The IRS, according to the complaint, has not revoked the tax-exempt status of the Church or any of its constituent parts and has not taken any

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[1] As the issue of standing was raised below on motions to dismiss, the Court is to accept as true all the material allegations of the amended complaint and the affidavits submitted by petitioners in opposition to the motions, and to construe these facts in the light most favorable to petitioners. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 n. 22, 112 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

Petitioners' claims are limited solely to the enforcement of the absolute prohibition in § 501(c)(3) against electioneering -- partisan political activity -- by tax-exempt organizations. They do not challenge the IRS' enforcement of tax code provisions governing lobbying and do not include any allegations concerning the Catholic Church's lobbying activities.

appropriate preventive or prosecutorial measures to redress these violations of law.

By thus exempting the Catholic Church from the tax code, the IRS has granted the Church the equivalent of a cash subsidy for partisan political activity, a subsidy denied petitioners.[2] As this subsidy violates petitioners' rights under the Establishment Clause of the First Amendment, petitioners seek an order requiring the IRS, among other things, to take appropriate enforcement action against the Catholic Church.

After the amended complaint was filed in January 1981, the defendants, which

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[2] "Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization. . . ." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983).

then included the government respondents and respondents USCC and NCCB, moved to dismiss the complaint on the ground, among others, that plaintiffs lacked standing to sue. In its July 1982 opinion, the district court upheld the standing of twenty-four plaintiffs as clergy members, voters and organizations whose members are voters, to assert certain claims against the government. (35a - 73a)[3]

Thereafter, respondents acting either in tandem or in unison, engaged in a tenacious, single-minded effort to have the district court's decision denying the

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[3] The district court dismissed the amended complaint in its entirety against the USCC and NCCB for failure to state a claim against those two bodies. (64a - 65a) The court also dismissed five plaintiffs, all health care facilities offering abortions, for lack of standing. (48a n.6, 72a) Three plaintiffs were subsequently dismissed by stipulation of the parties in March 1986 and one plaintiff died in February 1988. Twenty plaintiffs -- the petitioners -- remain.

motion to dismiss reversed. Among other things, respondents sought certification of the court's decision under 28 U.S.C. § 1292(b), which was denied, 552 F.Supp. 364 (S.D.N.Y. 1982), renewed the motion to dismiss after this Court's decision in Allen v. Wright, 468 U.S. 737 (1984) -- the district court adhered to its original decision, 75a - 84a -- and sought writs of mandamus or prohibition in the court of appeals and this court, both without success, In re Baker, 788 F.2d 3 (2d Cir. 1986) (table), and 479 U.S. 810 (1986).

Ultimately, after respondents USCC and NCCB wilfully refused to produce documents subpoenaed by petitioners, they were held in contempt by the district court, 110 F.R.D. 337 (S.D.N.Y. 1986). As noted above, their appeal from the contempt citation was reviewed by this Court during the 1987 Term, and this Court

remanded the amended complaint to the court of appeals for a determination of the petitioners' standing to sue.

On remand, a divided court of appeals found that none of the petitioners had standing and dismissed the complaint. (1a - 33a) The majority found that petitioners did not meet the test for standing because they did not show particularized injury in fact as clergy members, voters or "competitive advocates."[4] The majority held that the clergy petitioners alleged only "abstract stigmatic injury" because they "can point to no illegal government conduct directly affecting their own ministries." (14a) Similarly, the majority found that

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[4] The court of appeals also rejected the argument that petitioners have standing as taxpayers under Bowen v. Kendrick's re-interpretation of taxpayer standing, 108 S.Ct. 2562, 2579-80 (1988) (17a - 19a).

petitioners failed to allege "the particularized and objectively ascertainable injury in fact that sustained standing in the malapportionment cases" and rejected their claims of voter standing. (20a - 21a)

As for "competitive advocate standing," the majority recognized that the "essence of [petitioners'] charge is that the IRS' non-enforcement of the Code creates an uneven playing field, tilted to favor the Catholic Church" in the political arena. (21a) However, since the petitioners chose to obey the law and not use tax-exempt funds for partisan electioneering, the majority found that "they are not competitors" of the Church." (23a)

Judge Newman, in dissent, challenged this last "conclusion [as] rest[ing] on a needlessly narrow view of both the

realities of American political life and the contours of the doctrine of competitive advocate standing." (28a) He rejected the notion that petitioners had to violate the law before they could have their constitutional claims heard:

> [T]he decision to forgo electioneering is not a matter of personal preference, it is obedience to a requirement of an act of Congress. I fail to understand why any person or organization, seeking to challenge a violation of federal law, should be denied access to a federal court for the reason that it is obeying the law.

(31a)[5]

REASONS FOR GRANTING THE WRIT

1. The Issues In This Case Are Of National Significance.

The majority's decision below represents a view of standing and the

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[5] Because of his view that petitioners met the test for competitive advocate standing, Judge Newman stated that he did not have to reach the question of whether petitioners had standing on other grounds. (32a - 33a)

judiciary's proper role in protecting fundamental rights that directly conflicts with separation of powers principles long enunciated by this Court.[6]

The petitioners in this case challenge a governmentally created defect in the political process itself. Their complaint describes a situation in which the actions of the executive branch taint the political process by which the representative branches are elected. Petitioners challenge the government's grant of tax-exempt status to a religious organization which is then permitted to use the subsidy to help put in office those who would continue the exemption.

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[6] As the Court held in Allen v. Wright, 468 U.S. 737, 750-52, 761 n. 26 (1984), separation of powers principles underlie the standing requirements. Those principles, however, should be used to guide the standing analysis, not simply to limit it.

This presents one of the greatest dangers the First Amendment was designed to prevent: a mutually supportive relationship between government and a particular religion.[7]

Petitioners in this situation can not be expected to seek relief from those who have benefitted from the challenged actions. Separation of powers principles argue here for the independent branch of government to provide a judicial forum -- to open the courthouse door to hear the merits of petitioners' claims -- and not

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[7] Cf.:

> [T]he intensely divisive character of much of the national debate on the abortion issue reflects the deeply held religious convictions of many participants in the debate. The [government] may not inject its endorsement of a particular religious tradition into the debate for "[t]he Establishment Clause does not allow public bodies to foment such disagreement."

Webster v. Reproductive Health Services, 109 S.Ct. 3040, 3085 (Stevens, J.).

to "use[] 'standing to slam the courthouse door against plaintiffs.'" Allen v. Wright 468 U.S. at 766 (Brennan, J., dissenting).

For at least fifty years, this Court has recognized that the federal courts have a vital role to play under these circumstances, not in dictating the outcome of the political debate, but in assuring that the debate proceeds fairly according to rules applied even-handedly to all participants.

If "[t]he goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not," Webster v. Reproductive Health Services, 109 S.Ct. 3040, 3058 (1989) (Rehnquist, J., plurality opinion), the majority opinion below throws the balance out of kilter.

As this Court recognized in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), the judiciary plays an indispensable role in ensuring the fairness and inclusiveness of "those political processes that can ordinarily be expected to bring about" relief. Carolene Products similarly recognizes the need to conduct "a correspondingly more searching judicial inquiry" when examining actions "directed at particular religious . . . or racial minorities, . . . which tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Id.[8]

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[8] As the Fifth Circuit court of appeals wrote, upholding standing in a related context:

> We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution of an individual's fundamental voting rights: when a complaint alleges injury stemming from a clogged

(continued...)

To the extent the abortion-rights debate is to be returned to the political arena, it is more important than ever that the rules that govern debate in that arena be fairly applied to all the participants. If the judiciary is to play a reduced role in determining or reviewing the outcome of that debate, the courts have a correspondingly increased duty to review the integrity and fairness of the political process and to ensure that the representative branches of government are selected in accordance with the law.

2. The Decision Below Conflicts With Decisions of This Court.

A. Baker v. Carr: The injury in

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[8](...continued)
democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.
O'Hair v. White, 675 F.2d 680, 689 (5th Cir. 1982) (en banc).

fact that all petitioners have suffered is the necessity of fighting the abortion rights battle on an uneven playing field -- one on which their opponents have received a direct government subsidy, a subsidy petitioners are prohibited by law from receiving. Petitioners allege, in other words, that they have been injured by the government's unconstitutional distortion of the political process.

The majority below conceded that "plaintiffs' allegations of a political system biased against them by illegal government conduct are troubling." (23a) The majority dismissed the complaint, nonetheless, but only by misconstruing the standing requirements articulated by this Court in Baker v. Carr, 369 U.S. 186 (1962), and its progeny, and by declaring ipse dixit that petitioners were not "political competitors" of the Catholic

Church because petitioners obeyed the law and did not seek to use tax-exempt funds for electioneering purposes.[9]

Such a ruling, however, violates the separation of powers principles which inform Baker v. Carr and its progeny, and the standing analysis generally. The effect of the court of appeals' decision is to use the standing doctrine to insulate from judicial review any government conduct, short of actual gerrymandering or preventing someone from voting, which unconstitutionally infringes on the political process, a result inconsistent with Baker v. Carr.

The petitioners are from all walks of political life. They are actively

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[9] As shown below at pages 31-32, the petitioners do not have to violate a law to have standing to challenge the government's violation of it.

involved in the political debate over abortion rights and their activism takes many forms: all the individual petitioners are voters; several are substantial contributors to political campaigns on behalf of pro-choice candidates; one petitioner, at the time the lawsuit was commenced, was national issues director of a political party in New York State; another was a former candidate for political office who anticipates running again. The organizational petitioners are actively involved in the abortion debate either as tax-exempt organizations under § 501(c)(3) prohibited from engaging in partisan political activities, or as a tax-exempt organization under § 501(c)(4) not subject to the same restraints on political activity as a 501(c)(3) organization, but which cannot offer its donors tax deductions for their

contributions. (32a)

Under Baker v. Carr and its progeny, petitioners have standing to challenge governmental distortion of the political process. In Baker, 369 U.S. at 208, the Court recognized that those who "assert[] 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,'" state a cognizable injury upon which they have standing to sue. Such plaintiffs challenge governmental action that "plac[es] them in a position of constitutionally unjustifiable inequality vis-a-vis [favored] voters," id. at 207, and are "not merely [claiming] "the right, possessed by every citizen, to require that the Government be administered according to the law,'" id. at 208.

In Reynolds v. Sims, 377 U.S. 533, 562 (1964), the Court noted that "the right to elect legislators in a free and

unimpaired fashion is a bedrock of our political system." Indeed, "the substantive right to participate on an equal basis with other qualified voters [in the] electoral process," Lubin v. Panish, 415 U.S. 709, 713 (1974) (quoting San Antonio School District v. Rodriguez, 411 U.S. 1, 59 n. 2 (1973) (Stewart, J. concurring)), is a basic constitutional right, secured by the First and Fourteenth Amendments. Anderson v. Celebrezze, 460 U.S. 780, 786 & n. 7 (1983).

Petitioners state a cognizable violation of that fundamental right, namely, the distortion of the political process against petitioners caused by the government's subsidy of the partisan political activities of one participant in the political process, but not the petitioners'.

The government's actions make it much

more expensive for these petitioners to donate money to political campaigns and much more difficult for these petitioners to raise funds from others, as compared to campaign contributors or candidates with Catholic Church backing. Because petitioners' own political contributions or contributions to petitioners' own campaigns are not deductible, it costs petitioners considerably more to give $1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a tax-exempt, tax-deductible contribution to the Catholic Church. Candidates backed by the Church, therefore, can raise funds more easily than the petitioners or the candidates they support. (32a)

Petitioners are further harmed because the government permits the Catholic Church to use the power and

more expensive for these petitioners to donate money to political campaigns and much more difficult for these petitioners to raise funds from others, as compared to campaign contributors or candidates with Catholic Church backing. Because petitioners' own political contributions or contributions to petitioners' own campaigns are not deductible, it costs petitioners considerably more to give $1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a tax-exempt, tax-deductible contribution to the Catholic Church. Candidates backed by the Church, therefore, can raise funds more easily than the petitioners or the candidates they support. (32a)

Petitioners are further harmed because the government permits the Catholic Church to use the power and

B. Establishment Clause Injury: The majority decision below conflicts with this Court's definition of injury in Establishment Clause cases.

The majority holds that the petitioners who are clergy members did not allege injury "personalized" or "particularized" to themselves because "the clergy have neither been personally denied equal treatment under the law nor in any way prosecuted by the IRS." (14a) But this holding rests on a fundamental misconception of the petitioners' injury under the First Amendment.

Unlike claims for violations of other constitutional rights, direct governmental coercion is not a necessary element of an Establishment Clause violation. Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The

Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . ."); Allegheny County v. ACLU Greater Pittsburgh Chapter, 109 S.Ct. 3086, 3103 n. 47 (1989) (Blackmun, J.), 3119-20 (O'Connor, J.), 3131 n.6 (Stevens, J.)

The injury is the discrimination itself, a forbidden act of "denominational preference," Larson v. Valente, 456 U.S. 228, 245 (1982), which "sends a message to non-adherents that they are outsiders, not full members of the political community . . ." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring opinion).

Thus, all petitioners need to show in this context is that they are "directly affected by the laws and practices against which their complaints are directed." Abington School District v. Schempp, 374

U.S. 203, 224 n. 9 (1963) (emphasis added).

The five petitioners who are members of the clergy meet this test: they are directly affected by the laws and practices against which they complain. Petitioners are subjected to the same law, § 501(c)(3), as their Catholic brethren. But unlike their Catholic counterparts, petitioners, acting in their religious capacities, are not permitted by the statute or the government respondents to engage in an activity -- tax-exempt, tax-deductible partisan political campaigning -- that respondents permit Catholic clergy, in their religious capacities, to pursue.

The clergy petitioners are thus directly affected by the challenged conduct as they are personally denied by law benefits granted to other clergy

members who are constitutionally required to be treated in identical fashion as petitioners.

That the petitioners seek to halt the government's illegal and unconstitutional subsidy of the partisan political activities of the Catholic Church, rather than seeking to have the same subsidy extended to themselves, does not lessen their injury or diminish their standing. The petitioners should not be required to break the law in order to acquire standing. When the claim is the grant of a discriminatory preference in violation of the Establishment Clause, the injury is the same and is no less real -- the petitioners are equally directly affected -- whether the benefit is improperly granted to others who are constitutionally required to be treated the same as plaintiffs, or is coercively denied to

plaintiffs. Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890, 896 (1989) (Brennan, J., plurality opinion); Orr v. Orr, 440 U.S. 268, 272 (1979). In either case, an order directing the government to take the necessary steps to enforce the law equally will fully redress petitioners' grievance.[10]

The clergy petitioners challenge governmental action which diminishes petitioners' ability to use their pulpits in the same fashion as clergy members of a different religion, and directly affects how they can mobilize the resources of their congregations and otherwise carry out their ministries in competition with

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[10] Petitioners are not, as suggested by the majority below, (15a-17a), seeking standing as "clergy qua clergy," with all the negative implications that the majority notes. That argument is a straw man that ignores petitioners' actual argument based on the nature of Establishment Clause injury.

another religion. Under the decisions of this Court, such clergy members have standing to sue.

3. The Decision Below Conflicts With A Prior Second Circuit Decision.

The decision below is also in conflict with a decision by the same court of appeals issued five weeks earlier.

In the earlier case, Fulani v. League of Women Voters Education Fund, 882 F.2d 621 (2d Cir. 1989), a divided panel of the court of appeals upheld the standing of an independent presidential candidate to challenge the IRS's grant of a tax exemption to the organization that sponsored presidential primary debates.[11] The court of appeals' decision in Fulani

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[11] The only judge who heard both Fulani and the instant case, Judge Cardamone, dissented from the holding in Fulani upholding standing and wrote the majority opinion in the instant case denying standing.

is inconsistent with its decision in this case.

In Fulani, the panel defined the plaintiff's injury quite broadly -- in terms that readily include the petitioners in the instant case. "The essence of the judicially cognizable injury which Fulani has asserted," the panel stated, is the defendants' "allegedly partisan restriction of her opportunities to communicate her political ideas to the voting public at large." 882 F.2d at 627.

Petitioners suffer the same injury, the same "loss of competitive advantage" at the hands of the same government defendants as were sued in Fulani. Petitioners' ability to communicate their political, moral and religious messages vis-a-vis their Catholic counterparts is improperly restricted by the respondents. By allowing the Catholic Church to use

tax-exempt, tax-deductible dollars in the political arena, while petitioners cannot, the respondents have granted petitioners' competitor access to a powerful political tool denied petitioners.

That Fulani was an active candidate in the midst of an election campaign and petitioners are not is a distinction without a difference.[12] Petitioners are no less competitive political advocates than Fulani. As persons and organizations seeking public acceptance of their political and religious ideas, the petitioners are as much direct competitors of the Catholic Church (not itself a candidate, but a supporter of candidates), as Fulani is a competitor of the other presidential candidates.

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[12] This distinction appears to be relied upon by the court of appeals below in denying petitioners' application for rehearing. (86a)

In fact, the principal case relied upon by the majority in Fulani to support its standing decision, Common Cause v. Bolger, 512 F.Supp. 26 (D.D.C. 1980) (three-judge court), makes no distinction for standing purposes between a candidate and his supporters. In that case, plaintiffs challenged the Congressional franking statute as impermissibly conferring a benefit on incumbents seeking re-election. After determining that candidates for Congressional offices had standing to sue, the three-judge district court held:

> The analysis of contributor and campaign worker standing is similar. Contributors of "lawful amounts" of money to candidates for federal elective office, and "active participants" in these campaigns suffer injury regardless of the outcome of the election . . . The effectiveness of these contributions and campaign work will be substantially undercut by the funding subsidy of each incumbent.

512 F.Supp. at 31 (footnote omitted).

The cumulative effect of Fulani and the instant case is inconsistency and confusion on an important question of constitutional law: whether and under what circumstances the federal courts may adjudicate claims of injury to First Amendment rights caused by the activities of the IRS directed at third parties.

CONCLUSION

For the reasons stated above, in the dissenting opinion of Judge Newman and the opinions of the district court, the writ should be granted.

Respectfully submitted,

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January 29, 1990

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1486—August Term 1988

(Argued December 5, 1988 Decided September 6, 1989)

Docket No. 86-6092

IN RE: UNITED STATES CATHOLIC CONFERENCE ("USCC") and NATIONAL CONFERENCE OF CATHOLIC BISHOPS ("NCCB"),

Appellants,

ABORTION RIGHTS MOBILIZATION INC., LAWRENCE LADER, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMENS HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU, INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, WOMENS CENTER FOR REPRODUCTIVE HEALTH, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW and SUSAN SHERER,

Plaintiffs-Appellees,

—v.—

JAMES A. BAKER, III, Secretary of the Treasury, and ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,

Defendants.

Before:

NEWMAN, KEARSE and CARDAMONE,

Circuit Judges.

This appeal is on remand from the Supreme Court of the United States, 108 S. Ct 2268, 2273 (1988), to determine whether the district court lacked subject matter jurisdiction because the plaintiffs failed to satisfy requirements for Article III standing. The July 19, 1982 decision and order of the United States District Court for the Southern District of New York (Carter J.), reported at 544 F. Supp. 471 (S.D.N.Y. 1982), *aff'd on reh'g*, 603 F. Supp 970 (S.D.N.Y. 1985), found that plaintiffs did have standing to challenge the tax-exempt status of the Roman Catholic Church in the United States. We hold that the plaintiffs do not satisfy Article III's standing requirements, and that the district court therefore lacked subject matter jurisdiction.

Reversed and complaint dismissed.

Judge Newman dissents in a separate opinion.

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Richard S. Hoffman, Kevin J. Hasson, Williams & Connolly, Washington, D.C.; Mark E. Chopko, General Counsel, Phillip H. Harris, Solicitor, Washington, D.C., of counsel), *for Appellant United States Catholic Conference.*

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CARDAMONE, *Circuit Judge*:

This appeal is before us for a second time. The Supreme Court has remanded the matter for a determination of whether the United States District Court for the Southern District of New York (Carter, J.) had subject matter jurisdiction over the instant lawsuit that challenged the tax-exempt status of the Roman Catholic Church in the United States. The specific issue is whether the plaintiffs, who initiated this litigation to force the government to revoke the Catholic Church's tax-exempt status, satisfy the standing requirements of Article III. For the reasons discussed below, we hold that they do not.

I BACKGROUND

A. *The Plaintiffs*

Plaintiffs in this appeal are united in their commitment to a woman's right to obtain a legal abortion. This suit was instituted originally by 20 individuals and nine organizations. We assume familiarity with their specific identities as set forth in the district court's opinion. *See Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 474 (S.D.N.Y. 1982). Some are no longer parties. Of the nine original organizational plaintiffs, for example, the district court held that five abortion clinics lacked standing and dismissed their complaints. *Id.* at 479 nn. 5 & 6. The district court did grant standing to an organization called the Women's Center for Reproductive Health, because it is run by a Presbyterian minister who is also a plaintiff. We discuss the Women's Center with the clergy plaintiffs. The three remaining organizations are Abortions Rights Mobilization Inc. (ARM), the National

Women's Health Network Inc. (NWHN) and the Long Island National Organization For Women-Nassau, Inc. (Nassau-NOW). The former two are pro-choice organizations that are non-profit, tax-exempt organizations as defined in § 501(c)(3) of the Internal Revenue Code (Code). 26 U.S.C. § 501(c)(3). Nassau-NOW shares ARM's and NWHN's objectives, but is exempt from taxes under § 501(c)(4), rather than (c)(3).

Twenty individual plaintiffs also bring this suit. They include Protestant ministers and Jewish rabbis. In contrast to the views of the Catholic Church, they believe that abortion is morally permissible under some circumstances. Many of the individual plaintiffs donate money to or serve as directors of the organizational plaintiffs. The individual plaintiffs vote and pay taxes.

B. *Pertinent Statutory Framework*

Before reciting the history of the prior legal proceedings, an understanding of two pertinent sections of the Code is necessary, as a preliminary matter, to appreciate what is at stake in this litigation. As noted, the Catholic Church and organizational plaintiffs ARM and NWHN are tax-exempt under § 501(c)(3). That section states that qualifying religious or civic public interest organizations need not pay federal taxes. The trade-off for the benefit of this exemption is that no substantial part of the organization's activities may include "carrying on . . . propaganda, or otherwise attempting, to influence legislation . . . [nor may it] participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Thus, the *quid pro quo* for § 501(c)(3) tax-exemption is a restraint on an organization's right to try to influence the

political process. This limitation has been held constitutional. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983) (*TWR*). Section 501(c)(3) status is advantageous to the supporters of an organization as well as the organization itself because § 170 of the Code permits donors to § 501(c)(3) entities to claim a deduction for their contributions. This deduction gives the donor an economic incentive to contribute. For example, a donor in a 28 percent tax bracket actually pays only 72 cents for every dollar contributed to the Catholic Church because of the deduction. Consequently, organizations like the Church and plaintiffs ARM and NWHN have enhanced fundraising abilities because they are able to offer donors the lure of the § 170 deduction. *See* 461 U.S. at 546.

C. *The Dispute*

The plaintiffs object to the Internal Revenue Service's (IRS) enforcement—or, as they describe it, nonenforcement—of § 501(c)(3)'s prohibition on lobbying and campaigning. Because this appeal arises from a motion to dismiss for want of standing, we must accept all of the plaintiffs' allegations as true and draw all inferences in their favor. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Plaintiffs first allege that the Catholic Church is repeatedly violating § 501(c)(3)'s prohibition on campaigning in order to promote the tenet that abortion is immoral and should therefore be made unlawful. For instance, plaintiffs point to the Church's "Pastoral Plan for Pro-Life Activities", which they claim is an organized effort to mobilize the entire Church in a "three-fold educational, pastoral and political effort to outlaw abortions in the United States." Complaint, ¶ 22. The complaint also

alleges that through its priests and officials, the Catholic Church has endorsed or supported pro-life political candidates and opposed pro-choice candidates by publishing articles in its bulletins, attacking or endorsing candidates from the pulpit, distributing partisan letters to parishioners, and urging its members to donate to and sign petitions of "right to life" committees and candidates. Complaint, ¶ 26. Similarly, plaintiffs contend that the Church has contributed substantial sums of money to "right to life" and other political groups which have, directly or indirectly, supported the political candidacies for public office of persons favoring anti-abortion legislation. Complaint, ¶ 27.

Plaintiffs' other major contention is that the IRS knows about the Catholic Church's alleged political activities and has ignored these activities rather than either revoking the Church's tax-exempt status under § 501(c)(3), or not renewing the Church's annual exemption. They therefore assert that the government has "exempted the Roman Catholic Church from the strictures of the law and from the government's enforcement efforts," Complaint, ¶ 33, and that the IRS treats the Catholic Church more favorably than those organizations that are pro-choice. Yet plaintiffs do not allege that the IRS has penalized them for violating the Code; in fact, they assert that they have not violated § 501(c)(3) by electioneering, and do not intend to. Rather, they want the government to enforce the strictures of § 501(c)(3) against the Catholic Church. Thus, plaintiffs do not complain about their own tax status—their challenge is directed solely against the Catholic Church's exemption.

The complaint and affidavits also spell out the asserted harms plaintiffs suffer as a result of the Church's and the

IRS' acts. Because the nature of the claimed harm is an integral component in standing analysis, it will be fully analyzed in the later discussion of standing.

D. *Prior Proceedings*

In the amended complaint of January 30, 1981 the plaintiffs sued then-Secretary of the Treasury Donald T. Regan, then-Commissioner of Internal Revenue Roscoe L. Egger, Jr., the United States Catholic Conference, Inc., and the National Conference of Catholic Bishops (the latter two collectively the Catholic Church or the Church). The Catholic Church is composed of approximately 30,000 parishes, schools and other entities in the United States whose tax-exemption is granted collectively in a group ruling. The plaintiffs sought declarations that the defendants had violated both § 501(c)(3) of the Code and the Establishment Clause of the First Amendment to the United States Constitution. They also sought injunctive relief to compel the government to enforce the Code and Constitution by revoking the Church's group tax-exemption, to collect the resulting back taxes, and to notify contributors to the Catholic Church that they may no longer claim their donations as deductions on their income tax returns.

The defendants moved to dismiss the complaint on several grounds, including standing. In 1982 the district court held that the clergy and voter plaintiffs had standing, *see Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. at 491 (S.D.N.Y. 1982) (*ARM I*), and three years later—following a rehearing to consider the impact of the Supreme Court's subsequent decision in *Allen v. Wright*, 468 U.S. 737 (1984)—reiterated this holding. *See Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970

(S.D.N.Y. 1985) (*ARM II*). The defendant Catholic Church's motion to dismiss it as a defendant in the suit was granted. *See ARM I*, 544 F. Supp. at 487. As the litigation progressed, plaintiffs requested substantial discovery from the Church as a non-party witness. Upon its refusal to comply, the Catholic Church was held in contempt in May, 1986. *See* 110 F.R.D. 337 (S.D.N.Y. 1986).

On appeal, the Church argued that it was improperly held in contempt in the action because the district court lacked subject matter jurisdiction over the case before it due to plaintiffs' lack of standing. We held that, as a non-party contemnor, the Church itself lacked standing to challenge plaintiffs' standing in the main suit, and that as a non-party witness it could only challenge a contempt finding when the district court was without even colorable jurisdiction. Hence, we had no occasion to reach the underlying question now before us of plaintiffs' standing. *See In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987). The Supreme Court reversed, holding that a non-party witness held in contempt had standing to challenge the district court's subject matter jurisdiction. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268 (1988). Upon remand from the Supreme Court, we now must analyze whether plaintiffs have standing to sue the government for conferring tax-exempt status to the Catholic Church.

II DISCUSSION

A. *Standing Analysis*

In *Allen v. Wright*, 468 U.S. 737 (1984), the Supreme Court made clear that standing is not merely a prudential inquiry into whether a court should exercise jurisdiction, but is rooted in Article III's "case" or "controversy" requirement and reflects separation of powers principles. *See also Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Thus, when a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case. Deceptively simple to state, standing entails a complex three-pronged inquiry. First, plaintiffs must show that they have suffered an injury in fact that is both concrete in nature and particularized to them. *Allen v. Wright*, 468 U.S. at 755; *Valley Forge*, 454 U.S. at 482-87; *Warth v. Seldin*, 422 U.S. at 502; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Second, the injury must be fairly traceable to defendants' conduct. *See Allen*, 468 U.S. at 757; *Valley Forge*, 454 U.S. at 472; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (*EKWRO*); *Warth*, 422 U.S. at 504-05; *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). Third, the injury must be redressable by removal of defendants' conduct. *See Allen*, 468 U.S. at 758-59; *EKWRO*, 426 U.S. at 41-42; *Warth*, 422 U.S. at 504-05; *Linda R.S.*, 410 U.S. at 617. The second and third prongs—traceability and redressability—often dovetail; essentially, both seek a causal nexus between the plaintiff's injury and the defendant's assertedly unlawful act. To establish standing, a plaintiff must plead all three elements.

B. *Application to This Case*

Standing in the case at hand is alleged under a number of theories that require a general overview in order to match the category of plaintiff to the asserted basis for standing. The prior proceedings have distilled standing theories that view plaintiffs as clergy, voters, and taxpayers. We first address those theories relied upon by the district court in finding that plaintiffs had standing, and then consider a fourth theory—competitive advocate standing—not explicitly addressed below.

1. *Clergy Standing*

Clergy plaintiffs claim standing under the Establishment Clause of the First Amendment. That clause provides: "Congress shall make no law respecting an establishment of religion . . . ." The amended complaint alleges that

> The failure of the government defendants to apply the Code equally to the . . . Church is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere, a subsidy not granted to law-abiding . . . plaintiffs, who hold contrary religious beliefs. This constitutes an unconstitutional establishment of religion.

Complaint, ¶ 43. Without reaching the merits, the district court held that the clergy plaintiffs and the religiously affiliated Women's Center for Reproductive Health (collectively clergy plaintiffs) had standing under the Establishment Clause because they were "denigrated by government favoritism to a different theology." *See ARM I*, 544 F. Supp. at 479. Thus, it concluded that the IRS

"hampers and frustrates these plaintiffs' ministries." *Id.* at 480. The appropriateness of this holding turns on whether the stigma plaintiffs allege is a cognizable injury in fact. We think the district court erred by translating plaintiffs' genuine motivation to sue into a personalized injury in fact.

It is true that an injury claimed to derive from a violation of the Establishment Clause can be spiritual in nature. *See Valley Forge*, 454 U.S. at 486-87 n.22 (citing *School Dist. of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963)); *Association of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 154 (1970) (*Data Processing*). Nonetheless, the injury must be particularized to the individuals who sue. *See Valley Forge*, 454 U.S. at 486-87 n.22 (suggesting that plaintiffs must have been " 'directly affected by the . . . practices against which their complaints are directed.' " (quoting *Schempp*, 374 U.S. at 224 n.9)). The Establishment Clause does not exempt clergy or lay persons from Article III's standing requirements. *See Valley Forge*, 454 U.S. at 489. Here, the clergy plaintiffs have not been injured in a sufficiently personal way to distinguish themselves from other citizens who are generally aggrieved by a claimed constitutional violation. For that reason, they lack standing.

Both *Valley Forge* and *Allen v. Wright* support this conclusion. In *Valley Forge*, an organization dedicated to ensuring separation of church and state sued the Secretary of Health, Education and Welfare for conveying, without consideration, surplus government property to a religiously affiliated college. The *Valley Forge* plaintiffs made the same argument as the instant clergy plaintiffs—that by conferring a benefit to a third party that was a religious entity, the government had violated the Establishment

Clause. The Supreme Court considered whether plaintiffs had been injured as taxpayers—a subject we address below—and as "separationists" bent on policing the Establishment Clause. 454 U.S. at 482. Accepting the sincerity of plaintiffs' ire at the alleged violation of the Establishment Clause, it held that such distress was not cognizable unless plaintiffs could "identify any personal injury suffered by them *as a consequence* of the alleged constitutional error . . . ." *Id.* at 485 (emphasis in original). It was not enough to point to an assertedly illegal benefit flowing to a third party that happened to be a religious entity. Absent a particularized injury, plaintiffs could not maintain suit.

In *Allen v. Wright*, the plaintiffs were parents of black children who attended public schools. They sued the IRS, asserting that it was duty-bound to deny tax-exempt status to racially discriminatory private schools, and its failure to do so impaired desegregation of the public school system. *See* 468 U.S. at 739-40. In *Allen v. Wright*, as here, plaintiffs' complaint centered on the tax-exempt status of a third party. The parents asserted two injuries, only one of which is pertinent to this case—harm from the fact that the government was giving financial assistance to private discriminatory schools. *Id.* at 752-53. The Supreme Court held that the parents did not have standing and made several points on the injury in fact requirement.[1] *See* 468 U.S. at 756-57. Relying on *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (*Reservists*), the Court stated that "an asserted right to have the Government act in accordance with law is not sufficient, standing

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1 The Supreme Court held that although diminished opportunity for plaintiffs' children to obtain desegregated public education stated a cognizable injury in fact, the complaint failed to satisfy the standing requirement of traceability and redressability. *Allen*, 468 U.S. at 757.

alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. at 754. Parents did not derive standing by claiming "stigmatizing injury" caused by racial discrimination because "such injury accords a basis for standing only to 'those persons who are *personally* denied equal treatment' by the challenged discriminatory conduct." 468 U.S. at 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)) (emphasis added). The Supreme Court then emphasized that when the injury asserted is an "abstract stigmatic injury," the requirement that a plaintiff be personally injured takes on heightened importance. *See* 468 U.S. at 755-56.

The clergy plaintiffs' complaint in the instant case suffers from the same defects as the parents' complaint in *Allen v. Wright* and the separationists' complaint in *Valley Forge*: The primary injury of which they complain is their discomfiture at watching the government allegedly fail to enforce the law with respect to a third party. As in *Valley Forge*, the instant plaintiffs state that defendants have violated their "sincere and deeply held belief in the separation of church and state." *See, e.g.*, Affidavit of plaintiff Rev. Beatrice Blair. Complaint, ¶ 7. This injury can hardly be called personalized to the clergy plaintiffs. They can point to no illegal government conduct directly affecting their own ministries. Thus, the injury the clergy complain of could be asserted by any member of the public who disagrees with the views of the Catholic Church and the IRS in granting it a tax exemption. *See Allen v. Wright*, 468 U.S. at 755.

Similarly, because the clergy have neither been personally denied equal treatment under the law nor in any way prosecuted by the IRS, their self-perceived "stigma" does not amount to a particularized injury in fact. *See id.* To

hold the clergy plaintiffs' injury cognizable would turn the federal court into " 'a forum in which to air . . . generalized grievances about the conduct of government.' " *Valley Forge*, 454 U.S. at 483 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Hence, the clergy's complaint collapses into that of an offended bystander, insufficient to meet Article III's standing requirements. A mere "claim that the Government has violated the Establishment Clause does not provide [plaintiffs] a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge*, 454 U.S. at 487.

This analysis is unchanged by the fact that the plaintiffs in this case are clergy. To rebut the argument that they have not suffered a particularized injury, these plaintiffs contend that what distinguishes them from the ordinary member of the public who takes issue with the Church and IRS is that they are members of the clergy. In our view, the holding in *Valley Forge* and its progeny would have been the same even had those plaintiffs been members of the clergy rather than Americans United For Separation of Church and State because "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486.

Moreover, granting standing to clergy *qua* clergy raises several troubling issues. Granting standing to the instant ministers and rabbis on the basis that they were directly and personally injured by the IRS' actions solely on account of their stature within their churches and synagogues would require us to give greater credence to the clergy's beliefs with the beliefs of their parishioners. Thus, to hold that a religious leader is more qualified to bring an Article III "case" or "controversy" than a member of his

congregation seemingly entails an impermissible invasion into a church's or a synagogue's internal hierarchy and its autonomy. *See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969) (holding that in church property dispute, the First Amendment prohibits civil courts from passing on questions of religious doctrine). And, as the district court correctly noted, the Establishment Clause protects religions from secular interference. *See ARM I*, 544 F. Supp. at 479 n.5; *see also Engel v. Vitale*, 370 U.S. 421, 432 (1962) (stating that religion is "too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate").

Second, granting standing to enforce the Establishment Clause to clergy *qua* clergy might itself violate the same clause by constituting governmental favoritism of religion over non-religion. *See Texas Monthly v. Bullock*, 109 S. Ct. 890, 899- 900 (1989); *Abington*, 374 U.S. at 216. The Supreme Court has made clear that the Establishment Clause prohibits not only government endorsement of a given sect, but also forbids the government from generally favoring religion over secularism. *See Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Thus, the strength, intensity, or knowledge of one's religious beliefs obviously is not a criterion upon which to confer standing because such a rule would deny to non-believers the same benefits of maintaining suit. *See McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (except when required by the Free Exercise Clause, "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."). As Thomas Jefferson stated in his much quoted metaphor, the Establishment Clause was designed to build "a wall of separation between church and State." *Reynolds v. United States*, 98

U.S. 145, 164 (1878); *see also Everson*, 330 U.S. at 16. Plaintiffs point to no authority for a standing doctrine exception to this principle of separation between church and state. To read plaintiffs' complaint as stating a particularized injury simply because it is dressed in clerical garb would only weaken the foundation of Jefferson's metaphorical wall. As a consequence, stripped of the assertedly unique status of clergy, plaintiffs' injury is as generalized as that asserted in *Valley Forge* and *Allen v. Wright*, and their complaint must be similarly dismissed.

2. *Taxpayer Standing*

The taxpayer plaintiffs allege that they are "harmed because the government's subsidy of the . . . Church's illegal political activities is the equivalent of a government expenditure to establish a religion in violation of the First Amendment to the Constitution." Complaint, ¶ 48(a). In essence, they complain that not only is the government making illegal use of tax revenue, but also that they, as taxpayers, are forced to contribute to the government's asserted subsidy of the Catholic Church.

We set forth briefly the requirements for taxpayer standing, which are somewhat more specific than those for standing generally. The basic rule is that taxpayers do not have standing to challenge how the federal government spends tax revenue. *See Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). In *Flast v. Cohen*, the Supreme Court created an exception to the *Frothingham* rule, holding that taxpayer standing is available to challenge Establishment Clause violations when the allegedly unconstitutional action was authorized by Congress under the taxing and spending clause of Art. I, § 8. *See* 392 U.S. at 102-106. Subsequent cases made clear the narrowness of *Flast*'s

exception to *Frothingham*'s rule against taxpayer standing. *See Reservists*, 418 U.S. at 227-28; *United States v. Richardson*, 418 U.S. 166, 175-76 (1974).

Then *Valley Forge*—handed down in the interim between the filing of the instant complaint and the motion to dismiss—caused some commentators to conclude that the taxpayer standing theory was virtually a dead letter. *See, e.g., Note: Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U.L. Rev. 717 (1983). Hence, plaintiffs abandoned this theory in the district court. *See ARM I*, 544 F. Supp. at 476 n.1. Following the Supreme Court's more recent decision in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (holding that taxpayers had standing to challenge the application of the Adolescent Family Life Act (AFLA)), plaintiffs renew before us their taxpayer standing arguments. In light of the protracted history of this litigation, it is appropriate to consider this issue now, if for no other reason than to prevent a third appeal.

The Supreme Court in *Kendrick* distinguished *Valley Forge* by emphasizing that in the latter case the decision by the executive agency to dispose of the surplus federal property—though made pursuant to a federal statute—was not a challenge to Congress' taxing and spending power because the statute's mandate derived from the property clause of Art. IV, § 3. *See* 108 S. Ct. at 2579. In so doing, the Supreme Court clarified that taxpayer standing exists to challenge the executive branch's administration of a taxing and spending statute; the challenge need not be directed exclusively at Congress. *See id.* But *Kendrick*'s discussion of *Valley Forge* does not breathe new life into plaintiff's moribund taxpayer standing theory, as shall become evident.

In *Kendrick*, it was Congress that decided how the AFLA funds were to be spent, and the executive branch, in administering the statute, was merely carrying out Congress' scheme. *See id.* at 2580 ("[A]ppellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate."). Thus, the Supreme Court held that taxpayers had standing to challenge whether Congress' decision under the taxing and spending clause had violated the limits imposed by the Establishment Clause.

Plaintiffs in the instant case do not challenge Congress' exercise of its taxing and spending power as embodied in § 501(c)(3) of the Code; they do not contend that the Code favors the Church. The Supreme Court, as noted, has already upheld the constitutionality of that section. *See TWR*, 461 U.S. at 544. Instead, they argue that the IRS, in allegedly closing its eyes to violations by the Church, is disregarding the Code's mandate and the Constitution. The complaint centers on an alleged decision made solely by the executive branch that in plaintiffs' view directly contravenes Congress' aim. The instant case is therefore distinguishable from *Kendrick*. In that case, there was "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute." *Kendrick*, 108 S. Ct at 2580. Here, there is no nexus between plaintiffs' allegations and Congress' exercise of its taxing and spending power. Hence, *Kendrick* does not alter the requirements of taxpayer standing to allow the instant plaintiffs to challenge how the IRS administers the Code. Consequently, plaintiffs fall within *Frothingham*'s general rule denying taxpayer standing. *See* 262 U.S. at 488.

3. *Voter Standing*

The voter plaintiffs allege that they are injured because the IRS' refusal to revoke the Catholic Church's tax-exempt status "impairs and diminishes plaintiffs' right to vote." Complaint, ¶ 48(b). When it granted plaintiffs' "voter standing," the district court relied on *Baker v. Carr*, 369 U.S. 186 (1962). *See ARM I*, 544 F. Supp. at 480. The district court's appellation of this theory as "voter standing" as applied to this case is a misnomer; plaintiffs' asserted basis for standing has nothing to do with voting. In *Baker v. Carr*, the Supreme Court held that disadvantaged voters had standing to challenge Tennessee's apportionment plan. *Id.* at 206. The wrong that plaintiffs sought to vindicate in *Baker v. Carr* and in those cases that construed it was the dilution of their vote relative to the vote of other citizens of the same state—a direct, cognizable injury. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *see also Heckler v. Mathews*, 465 U.S. at 738 n.4; *Reservists*, 418 U.S. at 223 n.13 (construing *Baker v. Carr*).

The Supreme Court has also held that disadvantaged voters may challenge an apportionment plan that is gerrymandered, that is, a plan whose voting district lines are drawn to reduce or eliminate the voting leverage of a given group of voters. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986). It is undisputed that the instant plaintiffs do not allege that their vote has been diluted or that voting district lines have been gerrymandered to favor the Church or that anyone has "stuffed the ballot box" with votes for Church-backed candidates or that anyone has been prevented from voting. In short, plaintiffs here do not allege the particularized and objectively ascertainable injury in fact that sustained standing in the malapportionment

cases. We therefore hold that *Baker v. Carr* and its progeny are inapposite and provide no basis for granting voter standing to these plaintiffs.

4. *Competitive Advocate Standing*

We consider finally whether the plaintiffs may have standing under a theory that the district court did not explicitly consider, yet which derives from its discussion of "voter standing." This theory may be labeled as "Competitive Advocate Standing." It is addressed separately from voter standing for analytical clarity and because it presents a closer question.

Plaintiffs allege that they are injured "by the unequal enforcement of the Code by [the government] . . . which constitutes an illegal, unfair and unconstitutional distortion of the political process by the government . . . ." Complaint, ¶ 48(b). They argue that their chance of electoral success is diminished because they do not receive the advantage that the Church receives from the government's asserted non-enforcement of the Code: The ability to campaign without losing tax-exemption under § 501(c)(3), and the ability nonetheless to offer their contributors a tax deduction for donating. "In the inherently competitive political arena an advantage granted to one competitor automatically constitutes a hardship to the others." Complaint, ¶ 41. The essence of this charge is that the IRS' non-enforcement of the Code creates an uneven playing field, tilted to favor the Catholic Church. *See ARM II*, 603 F. Supp. at 974 ("The injury alleged in *ARM* is unequal footing in the political arena . . . ."). The fatal flaw in the argument is that plaintiffs are not players in that arena or on that field.

The Supreme Court has found cognizable injuries to economic competitors. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (per curiam); *Data Processing*, 397 U.S. at 151. Implicit in the reasoning of those opinions is a requirement that in order to establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit. Only then does the plaintiff satisfy the rule that he was personally disadvantaged. *See Allen v. Wright*, 468 U.S. at 755-56; *Heckler v. Mathews*, 465 U.S. at 739-40; *Valley Forge*, 464 U.S. at 485.

The economic competitor cases arose as banks diversified their functions, moved into new business areas, and became competitors of firms that had traditionally provided those services into which the banks sought to expand. The Supreme Court held that the organizations from which the banks sought to take away business—that is, with whom they sought to compete—had standing to challenge the banks' expansion into non-banking functions. *See Clarke*, 479 U.S. at 403 (granting standing to trade association composed of securities brokers, dealers and underwriters to challenge governmental ruling that banks could act as discount brokers); *Investment Co. Inst.*, 401 U.S. at 620 (granting standing to open end investment companies to challenge ruling that allowed bank entry into the field of collective investment funds); *Arnold Tours*, 400 U.S. at 46 (holding travel agents had standing to challenge ruling to permit banks to offer travel services); *Data Processing*, 397 U.S. at 151 (allowing data processors to challenge banks' foray into data processing); *see also Texas Monthly v. Bullock*, 109 S. Ct. at 896

(granting standing to secular magazine to challenge statutory tax-exemption of religious magazines).

In each of these cases the banks obtained governmental rulings allowing them to compete on the same "playing field" as the plaintiffs. The results would have been different had the travel agents, for example, sought to complain about the bank's incursion into the data processing business. *Cf. United States v. Richardson*, 418 U.S. at 176 n.9 (stating that *Data Processing* "recognized standing for those private business proprietors who were engaged in selling the *same kind of services* the Comptroller allowed banks to sell . . . ."') (emphasis added). It is equally inappropriate to allow the present plaintiffs to challenge the IRS' treatment of the Church, since by their own admission they choose not to match the Church's alleged electioneering with their own. Therefore, they are not competitors.[2]

Although the foregoing cases conferred standing to *economic* competitors, political competitors arguably should fare as well. Concededly, the *Data Processing* line of cases might extend to harms less concrete than diminution of profits. *See Data Processing*, 397 U.S. at 149 (stating that standing may stem from non-economic values). Plaintiffs' allegations of a political system biased against them by illegal government conduct are troubling. But, just as the Supreme Court has refused to recognize an Establishment

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2 Because we hold that the advocate competitor plaintiffs have not established an injury in fact, we need not decide whether they are " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 396 (quoting *Data Processing*, 397 U.S. at 153); *Valley Forge*, 454 U.S. at 474-75 (describing zone of interest test as a prudential concern to be evaluated after the prerequisites of Article III are satisfied).

Clause exception to standing doctrine, so must the requirements of Article III be applied with equal rigor to cases concerning participation in the political process. *Cf. Davis v. Bandemer*, 478 U.S. 109 (1986) (standing analysis applies to asserted "political gerrymandering"); *Baker*, 369 U.S. 186 (malapportionment). There is "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." *See Valley Forge*, 454 U.S. at 484; *see also Reservists*, 418 U.S. at 207-208 (rejecting standing for plaintiffs to challenge the independence of Congress on the grounds that because all citizens can claim injury from a Congress that violated the Incompatibility Clause, the injury was too generalized to be cognizable).

Like the claims of the clergy plaintiffs, the instant competitor claims lack particularized injury in fact. *See Allen v. Wright*, 468 U.S. at 755; *Valley Forge*, 454 U.S. at 482-87; *Warth v. Seldin*, 422 U.S. at 502. By asserting that an advantage to one competitor adversely handicaps the others, plaintiffs have not pleaded that they were personally denied equal treatment. *See Allen v. Wright*, 468 U.S. at 755-56; *Heckler v. Mathews*, 465 U.S. at 739-40; *Valley Forge*, 464 U.S. at 485. They concede their tax status was correctly assessed by the IRS. Moreover, the complaint indicates that no plaintiff is currently a political candidate for public office. Plainly, the whole point of this lawsuit is plaintiffs' contention that it is illegal for the Catholic Church as a § 501(c)(3) recipient to participate actively in the political process. And, recognizing that potential illegality and the value of their own exemptions under §§ 501(c)(3) and (c)(4), plaintiffs state that they have refused to engage in electioneering to counter the Church's

pro-life stance. Partly as a result of this self-imposed restraint, plaintiffs chose not to compete.

It may be argued that to qualify as competitor advocates plaintiffs need not go so far as to run for office or lobby; rather, they may simply advocate the pro-choice cause and stop short of supporting candidates. But that argument fails to answer the nagging question of why these individuals and organizations are then the appropriate parties to call a halt to the alleged wrongdoing. It is obvious that plaintiffs express their pro-choice views strongly and articulately. Yet such strongly held beliefs are not a substitute for injury in fact. *See Valley Forge*, 454 U.S. at 486; *Reservists*, 418 U.S. at 225-26 (stating that "motivation is not a substitute for the actual injury needed"); *Richardson*, 418 U.S. at 177; *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

A further problem with recognizing a competitor advocate theory of standing in the present case is that it would be difficult to deny standing to any person who simply expressed an opinion contrary to that of the Catholic Church. Affording standing on that basis would lack a limiting principle, and would effectively give standing to any spectator who supported a given side in public political debate. *Cf.* J.H. Ely, *Democracy and Distrust* 103 (1980) (courts should intervene when the playing field is tilted, not when they think the wrong side has scored). This is precisely the problem the Supreme Court addressed in *Valley Forge* when it denied standing to plaintiffs who sued as taxpayers and citizens. We think that result would have been the same even had they called themselves "competitor advocates"—as proponents of a theory of the Establishment Clause different than that held by the gov-

ernment or the college that received the government benefit.

A similar theory was also initially raised in *Reservists*, where the plaintiffs sued as taxpayers, citizens, reservists and as opponents to the Vietnam War who sought to promote their viewpoint through lawful means. The district court found citizen standing. But "opponent standing" was too much, even for a court that thought the concept of standing had "been almost completely abandoned." *Reservist Comm. To Stop The War v. Laird*, 323 F. Supp. 833, 839 (D.D.C. 1971), *aff'd*, 495 F.2d 1075 (D.C. Cir. 1972), *rev'd*, 418 U.S. 208 (1974). Plaintiffs then withdrew the theory, and the Supreme Court therefore did not have an opportunity to address it when it ruled that the reservists did not have standing as citizens or taxpayers. 418 U.S. at 216.

We do not foreclose the possibility that political competitors may state a cognizable injury; instead, we simply hold that the theory cannot be sustained here. Putting out into the stormy sea of this litigation, it is prudent to closely hug the shores of the pleaded facts and established law, and not venture out any further than we must. As a consequence, because we hold that plaintiffs have not pleaded a direct injury in fact, we need not decide whether the two other standing requirements of traceability and redressability have been met.

III CONCLUSION

It could be argued that if no one among this diverse group of plaintiffs has standing to challenge the IRS' application of § 501(c)(3) to the Church, than perhaps no one could ever have standing to raise this issue. But such is

irrelevant for determining whether the "case" or "controversy" requirement has been satisfied. *See Valley Forge*, 454 U.S. at 489; *Richardson*, 418 U.S. at 179; *Reservists*, 418 U.S. at 227 ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). As the Supreme Court noted, that "view would convert standing into a requirement that must be observed only when satisfied." *Valley Forge*, 454 U.S. at 489. Moreover, the lack of a plaintiff to litigate an issue may suggest that the matter is more appropriately dealt with by Congress and the political process. *Richardson*, 418 U.S. at 179.

Without reaching or deciding whether there are prudential reasons not to exercise jurisdiction, we conclude that plaintiffs have not met the Article III minimum requirements for standing. In sum, we hold that none of the plaintiffs has standing, that the district court therefore did not have subject matter jurisdiction, that the contempt adjudication must be vacated, and that the order denying the motion to dismiss the case must be reversed and the plaintiffs' complaint dismissed.

Reversed and complaint dismissed.

JON O. NEWMAN, *Circuit Judge*, dissenting:

The Court today rules that tax-exempt organizations advocating the right to an abortion have no standing to challenge the actions of the Internal Revenue Service in failing to enforce against the Catholic Church the statutory requirement that prohibits tax-exempt organizations from "participat[ing] in, or interven[ing] in . . . any political campaign . . . ." 26 U.S.C. § 501(c)(3) (1982).

The Court reaches this result by concluding that the "pro-choice" organizations are not competitors of the Catholic Church in the political arena on the subject of abortion. Because I believe that conclusion is incorrect—indeed, that it is contrary to the undisputed facts of the abortion controversy in Twentieth Century America, I respectfully dissent.

The majority begins its analysis by labeling the issue that divides us as "Competitive Advocate Standing." I think that is an admirable designation. The majority then recognizes that standing is frequently recognized for those who seek to challenge the lawfulness of governmental actions that inure to the benefit of their competitors. *See Texas Monthly v. Bullock*, 109 S. Ct. 890 (1989); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours v. Camp*, 400 U.S. 45 (1970) (per curiam); *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The majority then concludes that the competitor standing rule of these cases does not apply to the tax-exempt "pro-choice" organizations that are plaintiffs in this suit because they do not intervene in political campaigns.

That conclusion rests on a needlessly narrow view of both the realities of American political life and the contours of the doctrine of competitive advocate standing. To be an advocate in the political arena in this country, organizations and their members need not intervene in the campaign of any particular candidate for public office. Political advocacy takes many forms. To promote their views, a few people run for office. Others support candidates. But most Americans advocate their side of public issues by standing up for what they believe through a wide

range of activities beyond the formal processes of electoral politics. They speak to their friends and neighbors; they participate in community activities; they devote their time, their energy, and sometimes their money to their causes. All who engage in these activities are competing in the arena of public advocacy with those who choose to support differing points of view by various forms of advocacy, including backing like-minded political candidates.

The competition necessary to confer competitor standing need not be in the identical activity of one's economic or philosophical opponent. When the *Texas Monthly* challenged the tax exemption of religious magazines, it did not wish to compete in the precise activity of publishing religious magazines. It wished to compete in the broader field of magazine publishing, and it was accorded standing to challenge the economic benefit of a tax exemption conferred upon the competitive publisher of a religious magazine. So here, plaintiffs Abortion Rights Mobilization, Inc. and the National Women's Health Network, Inc. do not wish to compete in the political arena with the Catholic Church on the issue of abortion by the precise technique of supporting candidates for public office. Instead, they have chosen to compete in advocating their side of the abortion issue by distributing information on the availability of abortions, by speaking, writing, and marching, and by championing in countless other ways the cause of abortion rights.

If the words are to have any meaning at all, these plaintiffs are indisputably "competitive advocates" of the Catholic Church on the issue of abortion.

The majority reckons with the argument that the plaintiff 501(c)(3) organizations might qualify as competitive advocates if they "simply advocate the pro-choice cause

and stop short of supporting candidates." ____ F.2d at ____. The argument is dismissed by the assertion that the strongly held beliefs of the plaintiffs "are not a substitute for injury in fact." *Id.* Of course, they are not. But no one claims they are. The injury in fact is the competitive disadvantage the plaintiff organizations are obliged to endure when, accepting at this stage the allegations of the complaint, the Catholic Church is permitted to violate the tax laws by using tax-exempt donations to support the "anti-abortion" side of the national debate through contributions to like-minded political candidates, while the plaintiff organizations must confine their advocacy of the "pro-choice" side to those insubstantial lobbying activities that the tax laws permit. If the allegations of the complaint are true, and plaintiffs seek only the opportunity to prove them, the plaintiff organizations are seriously injured both in the eyes of the law and in the real world of political advocacy by the significant advantage currently being enjoyed by the Catholic Church as a result of governmental action that violates the tax laws. According to the complaint, the Catholic Church is using its tax-free funds to support political candidates who oppose the right to an abortion; the plaintiff 501(c)(3) organizations, abiding by the terms of the tax law, are limited to other forms of advocacy. Both sides are competing in the arena of public advocacy, but governmental action is tolerating a law violation that enables one side to promote its cause with a significant technique denied to the other side. That should be sufficient to permit the claim of law violation to be litigated.

In the majority's view, the plaintiff 501(c)(3) organizations and the Catholic Church are not competitors in the arena of public advocacy on the issue of abortion because the plaintiffs "choose not to match the Church's alleged

electioneering with their own." That makes it sound as if the plaintiff 501(c)(3) organizations have simply decided as a matter of personal preference that they do not wish to match the Church's alleged electioneering. But the decision to forgo electioneering is not a matter of personal preference, it is obedience to a requirement of an act of Congress. I fail to understand why any person or organization, seeking to challenge a violation of federal law, should be denied access to a federal court for the reason that it is obeying the law.

The majority further supports its rejection of competitive advocate standing by expressing concern that such standing would be too extensive, that "it would be difficult to deny standing to any person who simply expressed an opinion contrary to that of the Catholic Church." ____ F.2d at ____. I think this fear is groundless. The competition that most clearly creates standing in this case is not between the Catholic Church and every citizen who holds a contrary view on the issue of abortion. Such citizens are not limited by a statute that they are prepared to prove the Catholic Church is violating to their disadvantage. The competition is between those tax-exempt organizations that are abiding by the limitations of section 501(c)(3) in their advocacy on the abortion issue and the Catholic Church, which is violating these limitations in the advocacy of its point of view on the issue. Whether an individual citizen could challenge the Church's tax exemption on the theory that its unlawful support of political candidates is aided by tax-free donations unavailable to the ordinary citizen is a question far beyond the narrow issue we are required to decide in this case. A standing doctrine is entirely within manageable bounds when it recognizes the competition among organizations all of which are subject to the same statutory restraint and permits the law-abiding

competitors to challenge the governmental action that enables one organization to violate that restraint to the detriment of the others.

A variant of the competitive advocate doctrine should also confer standing on the one plaintiff that is a 501(c)(4) organization, Long Island National Organization for Women-Nassau ("Nassau NOW"). This plaintiff, by qualifying as a tax-exempt organization under section 501(c)(4), is not subject to the restraints on political activity imposed by section 501(c)(3), but is obliged to solicit donations that are not tax deductible to the donors. *See Regan v. Taxation With Representation*, 461 U.S. 540, 543 (1983). Like the 501(c)(3) plaintiffs, Nassau-NOW competes with the Catholic Church in the arena of public advocacy on the issue of abortion, but does so under a competitive disadvantage that is different from the one existing between the Church and the 501(c)(3) plaintiffs. The latter may not support political candidates at all, while the Church, though barred from doing so, provides such support (according to the complaint). Nassau-NOW may engage in political activity but only with donations that cost its donors 100 cents on the dollar, while the Church supports political candidates with tax deductible donations that cost its donors only 67, 72, or 85 cents for every dollar contributed, depending on whether they are in the 33%, 28% or 15% bracket. That competitive disadvantage, arising from what plaintiffs are prepared to prove is a violation of law, is also sufficient to confer standing on the entity that is disadvantaged.

Whether any of the other plaintiffs have standing presents issues that I need not decide. We are asked to adjudicate the lawfulness of a contempt citation for refusing lawful discovery requests that has been challenged

solely on the ground that the District Court lacks jurisdiction over the subject matter of the complaint. If any one plaintiff has standing to bring this lawsuit, the jurisdiction of the District Court to require compliance with the discovery requests is established, and the contempt judgment against the recalcitrant witnesses should be affirmed. For these reasons, I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 5990 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER, HAROLD W. BOSTROM, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMEN'S HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, LAUREN CLINIC, INC., MILAN M. VUITCH, M.D., WOMEN'S CENTER FOR REPRODUCTIVE HEALTH CENTERS, INC., HARRISBURG REPRODUCTIVE HEALTH SERVICES, INC., HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, INC., WOMEN'S HEALTH SERVICES, INC., JANE C. DELGADO, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW, AND SUSAN SHERER,

Plaintiffs,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, UNITED STATES CATHOLIC CONFERENCE, INCORPORATED, AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Defendants.

July 19, 1982

OPINION

ROBERT L. CARTER, District Judge.

This is an action challenging the constitutionality of the government's enforcement of § 501(c)(3) of the Internal Revenue Code ("Code"), 26 U.S.C. § 501(c)(3) (1976). Plaintiffs are 29 individuals and organizations concerned about the right of a woman to choose to carry a fetus to term or to abort it and about the constitutionally mandated separation of church and state. The complaint names four defendants: two government officers ("government" or "federal defendants"), Donald T. Regan, the Secretary of the Treasury, and Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and the two principal national organizations of the Roman Catholic Church in the United States ("church defendants"), the United States Catholic Conference, Incorporated ("USCC"), and the National Conference of Catholic Bishops ("NCCB").

Defendants move to dismiss the action. They assert that none of the plaintiffs has the requisite standing to bring the suit, that the complaint does not state a claim upon which to grant relief, and that the court may not review the particular decisions to enforce or not to enforce § 501(c)(3) that are in dispute. In addition, the church defendants contend that they are not proper parties to this suit and that § 501(c)(3) is unconstitutional. For the reasons discussed herein, the motions to dismiss are granted in part and denied in part.

I

A. *The Plaintiffs*

The complaint names nine organizations and twenty individuals as plaintiffs. Each plaintiff (except Judith Seibel) has submitted an affidavit to augment the complaint's description of that plaintiff's particular concerns and injuries. The plaintiffs are described briefly here;

their particular grievances are discussed in greater detail *infra.*

Abortion Rights Mobilization, Inc. ("ARM") is a non-profit, tax exempt organization under § 501(c)(3) that seeks to secure and implement a women's right to a legal abortion. It is a national organization and is prohibited from engaging in political activity under the terms of its tax exemption. Contributions to ARM are tax-deductible.

Lawrence Lader is a writer, and founder and president of ARM. He has been active in the abortion rights movement and has written a number of books on the subject.

Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., and Ruth P. Smith all contribute to ARM, other abortion rights organizations and pro-choice political candidates.

National Women's Health Network, Inc. ("NWHN") is a tax-exempt membership organization of many clinics, counseling services, publishers and others who provide a wide range of services to women and attempt to influence the public to support women's rights, including the right to have an abortion. Contributions to NWHN are tax-deductible, but the organization is prohibited under § 501(c)(3) from engaging in electoral politics.

Long Island National Organization For Women ("Nassau-NOW") is a membership organization dedicated to the promotion of women's rights, including the right to have an abortion. Nassau-NOW is exempt from taxes under § 501(c)(4) of the Internal Revenue Code.

Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverned Robert Hare and Reverend Marvin G. Lutz ("clergy plaintiffs") are members of the clergy whose religious beliefs differ significantly from the Catholic Church's view of abortions. These clergy members have been active in the abortion rights movement but have not used the power of their pulpits to engage in political activities.

Laurel Clinic, Inc., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc. and Women's Health Services, Inc. are clinics that offer to women a range of medical and other services, including abortions. The Federation of Feminist Women's Health Centers, Inc., Women's Health Services Inc. and the Women's Center for Reproductive Health are exempt from taxes under § 501(c)(3).

Milan M. Vuitch, M.D., is president of the Laurel Clinic, Inc.

Jane C. Delgado, Jennie Ross Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski and Judith A. Seibel are Roman Catholics who, in keeping with their religious beliefs, contribute or have contributed to the church but who nonetheless are opposed to the church's position on abortion.

Karen DeCrow is a leader of the feminist movement and a former national president of the National Organization for Women. She was a candidate for political office in 1969 and is a potential candidate in the future.

Susan Sherer is active in the abortion rights movement.

All the individual plaintiffs are taxpayers and voters. Each of them in his or her affidavit expresses a substantial concern for the separation of church and state that is required by the establishment clause of the first amendment. Finally, plaintiff Brickner, as a private citizen, is chairman of the national issues committee of the New York State Liberal Party.

B. *The Statutory Scheme*

Section 501(c)(3) of the Code exempts from taxation groups "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . no substantial part of the activities of which is carrying on prop-

aganda, or otherwise attempting, to influence legislation . . ., and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501(c)(3) (1976). Organizations exempt from income taxation under this section in effect receive a double benefit because § 170(a), (c)(2)(B) of the Code permits an income, gift or estate tax deduction for contributions to most § 501(c)(3) entities. *See* 26 U.S.C. § 170 (1976). Section 501(c)(3) status, thus, is valuable to an organization because the organization can provide donors with an economic incentive to contribute to it and the organization is not taxed on the income received. Organizations exempt from taxation under other portions of § 501, by contrast, often are not entitled to receive tax-deductible contributions. *See* 26 U.S.C. §§ 170, 501 (1976).

To maintain the dual benefits of tax exemption and deductible contributions, a § 501(c)(3) entity must refrain from any kind of campaigning for candidates for public office. 26 U.S.C. § 170(a), (c)(2)(D) (1976); *id.* § 501(c)(3). These groups, however, are allowed to lobby as long as their attempts to influence legislation do not constitute a "substantial part" of their activities. 26 U.S.C. § 501(c)(3) (1976).

C. *The Dispute*

The Internal Revenue Service ("IRS"), annually since March 25, 1946, has ruled that "the agencies and instrumentalities and all educational, charitable, and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory . . . are entitled to exemption from Federal income tax under . . . section 501(c)(3). . . ." Exh. A to church defendants' Motion to Dismiss (Letter from T. Kern, District Director, IRS to

USCC, June 16, 1980). Defendant USCC is the recipient of the Revenue Ruling letter that certifies the church's exemption status.

Plaintiffs contend that this grant of § 501(c)(3) privileges was erroneously and illegally conferred because the church defendants are engaged in a nationwide plan to change abortion laws by, *inter alia*, lobbying and participating in partisan political campaigns on behalf of candidates supporting the Roman Catholic Church's position on abortion and in opposition to candidates with contrary views. Amended Complaint ¶¶ 21-28; *cf. McRae v. Califano*, 491 F.Supp. 630, 703-28 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (describing some of the church's electoral and legislative activities pursuant to its "Pastoral Plan" to outlaw abortion). Despite this violation of the Code, plaintiffs allege, the government defendants have declined to apply the § 501(c)(3) prohibition against electioneering or lobbying to the church defendants and their subsidiaries. By contrast, no organization with different views on the abortion controversy has been granted tax-exempt status under 501(c)(3) while being permitted to participate in electoral politics.

Plaintiffs contend that this illegal activity has injured them in several ways. The individual plaintiffs and the members of certain of the institutional plaintiffs have been denied access to a means of contributing tax-deductible funds to promote free choice candidates. Persons with opposing views about abortion, on the other hand, can use the church to funnel donations to support candidates opposed to abortion and thereby receive a tax benefit. Those plaintiffs who have stood for office or aspire to do so on a pro-choice platform have no means of collecting tax-deductible and exempt funds for their campaign chests. Their opponents may do so. The govern-

ment defendants, it is alleged, have diminished the effectiveness of plaintiffs' political speech and their chances to prevail at the polls by enhancing the voice of plaintiffs' political adversaries.

Plaintiffs also express concern about the entanglement of church and state through the selective grant of an unrestricted tax exemption to the church defendants. The government defendants' actions are viewed by plaintiffs as selecting a favored state orthodoxy, thereby breaching the wall between church and state and denigrating religious beliefs out of government favor. In addition, plaintiffs who are religiously compelled to consider abortion as the correct response to pregnancy or who, as ministers, must counsel their congregants to do the same, express the fear that government financial support, through the Code, of the Roman Catholic Church's position on abortion will imperil the opportunity of women to obtain abortions and thereby frustrate their ability to observe their religious beliefs. Plaintiffs who are members of and contributors to the Roman Catholic Church object to their church's political use of the religiously compelled contributions.

The organizational plaintiffs complain that the government defendants have treated them differently from the church for no rational reason. In addition, those plaintiffs offering medical services to women, including abortion, assert that as a result of the church defendants' government subsidized political campaigning, restrictive abortion legislation has been enacted that has caused a decrease in plaintiffs' revenues.

Plaintiffs seek a declaration from the court that the political activities of the Roman Catholic Church and the inaction by the Secretary and the Commissioner violate the Constitution and the Code. In addition, plaintiffs request an order requiring the government defendants to take all actions necessary to enforce the Constitution and the Code, including revocation of the church defendants' § 501(c)(3) status, collection of all taxes due, and noti-

fication to church contributors that they may not deduct such contributions.

Jurisdiction is founded on 28 U.S.C. §§ 1331, 1340, 1361.

II

Defendants challenge plaintiffs' standing to bring an action concerning the tax status of third parties. Plaintiffs respond by asserting three bases for their right to proceed: establishment clause standing, voter standing, and equal protection standing.[1]

A. *Article III Requirements*

The Supreme Court recently has had occasion to examine and clarify the rules for standing in federal courts.

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 [98

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[1] Plaintiffs have withdrawn a fourth theory of standing based upon their status as taxpayers. Taxpayer standing is a narrow grant to challenge Congressional action under the taxing and spending power of Art. I, § 8 of the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, —— U.S. ——, ——, 102 S.Ct. 752, 762-63, 70 L.Ed.2d 700 (1982) [hereinafter cited as *Valley Forge*]; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 174-75, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974).

For purposes of ruling on the standing question, the court must accept as true all material allegations in the complaint, construe the complaint in favor of the plaintiffs and similarly consider supporting affidavits. *E.g. Warth v. Seldin*, 442 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.E.2d 343 (1975).

> S.Ct. 2620, 2629, 57 L.Ed.2d 595] (1978), quoting *Baker v. Carr*, 369 U.S. 186, 204 [82 S.Ct. 691, 703, L.Ed.2d 663] (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury . . .' to the plaintiff," *Duke Power Co.*, 438 U.S. at 72 [98 S.Ct. at 2629], quoting *Warth v. Seldin*, 442 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), and 'a fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co.*, 438 U.S. at 72, [98 S.Ct. at 2629], quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 [97 S.Ct. 555, 561, 50 L.Ed.2d 450] (1977).

Larson v. Valente, —— U.S. ——, ——, 102 S.Ct. 1673, 1680, 72 L.Ed.2d 33 (1982). In addition to demonstrating an injury that the challenged action caused, plaintiffs must show "the the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 74, 98 S.Ct. at 2630; *accord, Larson v. Valente, supra* 102 S.Ct. at 1682 n. 15; *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Court's statements indicate that a three step inquiry should be observed in determining Article III standing: injury in fact must be ascertained, a causal link between the injury and the putatively illegal conduct must be identified, and the court must be able to provide a remedy.[2]

1. *Establishment Clause Standing.* The existence of Article III injury "often turns on the nature and source of the claim asserted." *Warth v. Seldin, supra*, 442 U.S. at 500, 95 S.Ct. at 2205. The injury in fact requirement

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[2] Although some opinions have described the test as a two pronged one, the second "prong" seemingly contains two discrete, albeit closely related, elements; causation and redressability. For purposes of clarity, the test therefore shall be considered to analyze three separate factors.

can be satisfied by a wide range of harms, including economic, aesthetic, environmental, or spiritual damage. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111-12, 99 S.Ct. 1601, 1613-1614, 60 L.Ed.2d 66 (1979) (denial of right to interracial association); *Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 73-74, 98 S.Ct. at 2629-2630 (environmental and aesthetic consequences of pollution); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973) (enjoyment of natural resources); *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 208-210, 212, 83 S.Ct. 1560, 1563-1564, 1565, 10 L.Ed.2d 844 (1963) (spiritual values). There is no invariant meaning to the term "palpable injury"; the Constitution or a statute can create an interest that exists only in the legal regime, and damage to such an interest may fulfill the injury in fact requirement. *See Valley Forge, supra*, 102 S.Ct. at 769 (1982) (Brennan, J., dissenting); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152, 71 S.Ct. 624, 638, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

Although the Supreme Court has recognized that violation of a person's "spiritual stake in the First Amendment values" of separation of church and state may inflict sufficient harm to satisfy the injury in fact test, *see Data Processing Service Organization v. Camp*, 397 U.S. 150, 154, 95 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970), *citing School Dist. of Abington Township, Pa. v. Schemmp, supra*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, it has cautioned that offense to one's sense of fidelity to separatist principles is an insufficient injury to bring suit for an alleged establishment clause violation. *See Valley Forge, supra*, 102 S.Ct. at 764-66; *Doremus v. Bd. of Education*, 342 U.S. 429, 431, 433-34, 72 S.Ct. 394, 396, 396-97, 96 L.Ed. 475 (1952). Would be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed."

School Dist. of Abington Township, Pa. v. Schempp, supra, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9.

In *Valley Forge*, the Supreme Court overturned a decision granting standing to an organization suing on behalf of its members who professed injury to their shared individuated right to non-establishment when surplus federal property was transferred to a denominational college.[3] *See* 102 S.Ct. at 764-66. Crucial to the Supreme Court's decision was the complete lack of connection between the plaintiff and the property. Neither plaintiff nor its members alleged any physical contact with the college or its environs, and plaintiff and its members did not claim that they may have been entitled to the property if it had not been given to the college. Although the transfer affronted plaintiff's members' sense of command of the establishment clause, they could not identify any more definite and personalized connection with the objectionable transaction. *See id.* at 766. In the absence of some interest in the property, plaintiff or its members suffered no injury from the transfer.

Similarly in *Doremus v. Bd. Education*, the Court dismissed for lack of standing the complaint of taxpayers contending that a New Jersey statute requiring Bible reading at the opening of the school day violated the establishment clause. *See* 342 U.S. at 430, 72 S.Ct. at 395. Plaintiffs did not allege any personal, religiously inspired interest or activity that the Bible reading interfered with nor did they have any personal contact with the recitations, either through attendance or through children in attendance. *See id.* at 431, 72 S.Ct. at 396.

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[3] Although the *Valley Forge* plaintiffs asserted principally a claim of taxpayer standing, the Supreme Court opinion discussed at length the standards for establishment clause standing. *See* 102 S.Ct. at 763-67. This discussion was in direct response to the basis for finding standing that the Court of Appeals had articulated. *See id.* at 763-64.

Underlying the rejection of plaintiffs' standing in *Valley Forge* and *Doremus* is the principle that the interest of each citizen that the government be administered according to law does not confer standing because it does not create in that citizen a discrete and palpable injury. *Valley Forge, supra*, 102 S.Ct. at 764; *see Schlesinger v. Reservists Comm. to Stop the War, supra*, 418 U.S. at 216-22, 94 S.Ct. at 2929-2932 (1974). Plaintiffs asserting establishment claims, as any other plaintiffs, have "no special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge, supra*, 102 S.Ct. at 766 (footnote omitted).[4]

The individual plaintiffs' concern about the establishment clause violations perpetrated by the defendants does not rise above the whistleblowing that the Supreme Court held, in *Valley Forge*, does not satisfy the injury requirement. Plaintiffs attempt to articulate injury in fact by linking the offending activity with their involvement in the abortion rights controversy. They describe the government action of which they complain as a subsidy to opponents of abortion that impacts on plaintiffs' particu-

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[4] The crucial standing defect in the claim of a citizen alleging governmental misconduct and nothing more is not that the alleged misconduct does not inflict harm on someone, but that the wrongdoing does not injure the plaintiff personally. Such allegations may be sufficient to make out a claim that someone has been injured; they fail to confer standing because they do not satisfy the Article III requirement that the plaintiff be among those who have suffered the injury. *See Warth v. Seldin, supra*, 422 U.S. at 502, 95 S.Ct. at 2207; *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F.Supp. 564, 568 & n.7 (D.D.C.) (three judge court), *appeal dismissed*, 447 U.S. 916, 100 S.Ct. 3005, 65 L.Ed.2d 1109 (1980).

This standing defect should not be confused with the prudential reason for declining to hear a case that presents a generalized grievance that is better resolved by the executive or the legislature even though the plaintiff has suffered an injury in fact and has satisfied the other Article III standing requirements. *See* p. 484 *infra*.

larized interest to preserve reproductive choice. Plaintiffs argue, in effect, that because they object to an establishment violation occurring in a particular arena of public controversy in which they are involved, they have suffered a discrete and palpable injury not experienced by the *Valley Forge* plaintiff. Plaintiffs' characterization of their injury shares the defect that caused the demise of the *Valley Forge* complaint. In both cases, plaintiffs described an interest that brought them to court, but they did not articulate an injury that they had suffered. Plaintiffs' devotion to the pro-choice position does not identify an interest that the allegedy illegal activities have damaged; it only explains why plaintiffs have chosen to complain about a particular government impropriety—renewal of the church defendants' § 501(c)(3) status—and not about some other wrongdoing. Plaintiffs' "special interest" in reproductive freedom is no different than the *Valley Forge* plaintiff's "special interest" in strict separation. The narrowness of the focus of litigant's concerns is not of constitutional significance as far as standing is concerned. There is no indication in the *Valley Forge* opinion that the plaintiff there would have met the injury in fact test if it single-mindedly pursued its anti-establishment goals in the field of public education only, rather than its objections to government support for any religious body or activity. *See id.* 102 S.Ct. at 765 ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").[5]

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[5] Several Roman Catholic laity assert claims of injury that could be distinguishable from the claims of the public generally. These plaintiffs object to the federal defendants' standing aside while the church violates § 501(c)(3) by using funds contributed to it, including donations from the plaintiffs, to electioneer for anti-abortion candidates. Such claims might be construed to plead injury to the plaintiffs' church from non-enforcement of the Code. The establishment clause was designed not only to protect civil society from undue pressures from spiritual communities within it, but also to protect the sacred life of the population from the taint of secular politics. *See Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 39-40, 53-54, 67 S.Ct. 504, 522-523, 529-530, 91 L.Ed. 711 (1947)

The organizational plaintiffs also fail to set out the injury in fact to themselves or their members that is necessary to confer standing under the establishment clause. They merely allege concern about the first amendment violations arising from the church's political activity while it enjoys § 501(c)(3) status. As did the individual plaintiffs, the organizations have explained why they are moved to bring suit to end these violations; they have not, however, explained how the violations injure them.[6]

The clergy plaintiffs and the Women's Center for Reproductive Health ("Women's Center") have disclosed, in their affidavits, compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged established clause violations. The clergy plaintiffs

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(Rutledge, J., dissenting); Memorial and Remonstrance Against Religious Assessements ¶¶ 6-8, *reprinted in id.* at 67-68, 67 S.Ct. at 536-537.

In their affidavits, however, these plaintiffs do not express concern for the pollution of their church by its forbidden entrance into the area of politics. Their expressed claims are limited to injuries to their "rights to live in a society that believes in freedom of religion." *E.g.* Delgado affidavit ¶ 5; Walsh affidavit ¶ 5. This is a generalized harm experienced as a citizen, not as a church member, and is a harm that is indistinguishable from the injury inflicted upon all citizens by executive disregard for the law. Because these plaintiffs have not complained of a distinct and palpable injury inflicted upon them as practicing Roman Catholics, they have no standing under the establishment clause.

[6] The groups providing medical services to women arguably occupy a different position from the other institutional plaintiffs because they allege threatened or actual economic loss from the defendants' illegal activities. This injury, however, will not confer standing because the causal link between the church's tax status and these plaintiffs' lost revenues is tenuous at best. It is doubtful that the marginal increase in the coffers of the foes of abortion that is attributable to the church's tax exemption is a significant factor in legislation that has reduced the income of abortion clinics.

have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy.[7] The Women's Center provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing. It was founded by Reverend Lutz along with others to put the principles of the Presbyterian Church into effect. As with the clergy plaintiffs, the Women's Center's religiously inspired mission is denigrated by government endorsement of a theology contrary to its guiding principles.

Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because of official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message. The spiritual values protected by the establishment clause can be injured without direct coercion against individuals, *see Engel v. Vitale*, 370 U.S. 421,

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[7] The clergy plaintiffs have identified in their affidavits their respective denominations' attitudes towards pregnancy and abortion. These affidavits state that certain theologies consider compelling a woman to carry a fetus to term as repugnant as other theologies, such as the contemporary Roman Catholic Church doctrine, find abortion, *see* Affidavit of Rabbi Israel Margolies ¶ 3 ("To force a woman to bring an unwanted fetus into the world is a serious abridgement of the Bible . . ."), and that the availability of safe abortions may be necessary to permit a women to fulfill her religious obligations, *see* Affidavit of Rev. Beatrice Blair ¶¶ 5-6 ("part of Episcopalian doctrine that women and families should be free to terminate [certain] pregnancies."); *cf. McRae v. Califano*, *supra*, 491 F.Supp. at 696-702 (discussing pro-choice theological doctrines).

430-31, 82 S.Ct. 1261, 1266-1267, 8 L.Ed.2d 601 (1962) (indirect coercive pressure to conform to officially approved doctrine), even if plaintiffs have not alleged that particular religious freedoms have been infringed, *School Dist. of Abington Township, Pa. v. Schempp*, *supra*, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9 (1963). It is sufficient to establish injury in fact that plaintiffs can show, as the clergy plaintiffs have, that the challenged action adversely affects them in their daily lives. *See id.*

These plaintiffs also clearly satisfy the second and third aspects of the Article III standing test—causation and redressability. Their injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury. Accordingly, the clergy plaintiffs and the Women's Center meet the Article III requirements for standing to raise claims under the establishment clause.

2. *Voter standing.* In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court conferred "voter standing" on a group of Tennessee citizens challenging the state's apportionment scheme as "effecting a gross disproportion of representation to voting populations." *Id.* at 207, 82, S.Ct. at 704. The plaintiffs asserted that the classification disfavored the voters in some counties by "placing them in a position of unjustifiable inequality *vis-a-vis*" voters in other counties. *Id.* These allegations stated sufficient injury to satisfy the Article III standing requirements.

Baker's voter standing analysis was applied in three cases that strongly support a finding that the individual

plaintiffs[8] and certain of the organizational plaintiffs[9] have aserted a distinct, personal injury that confers standing. Two of the cases, like the instant action, involved challenges to the enforcement of the tax laws. All three are highly instructive.

Tax Analysts and Advocates v. Schultz, 376 F.Supp. 889 (D.D.C. 1974), involved a challenge to an IRS revenue ruling stating that gifts of up to $3,000 to multiple finance committees organized to receive campaign con-

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[8] Plaintiffs Lader, Bostrom, Strahl, Edey, Smith, Margolies, Blair, Brickner, Hare, Lutz, Vuitch, Delgado, Lifrieri, Walsh, Luciano, Michalski, Niebrzydowski, Seibel, DeCrow, and Sherer.

[9] None of the organizational plaintiffs can allege injury to themselves as organizations in the context of voter standing. *See Simon v. E. Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 39-40, 96 S.Ct. at 1924-1925 (1976); *Fed'n for Am. Immigration Reform v. Klutznick*, *supra*, 486 F.Supp. at 569. Organizations can establish standing, however, "as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. *Warth v. Seldin*, *supra*, 442 U.S., at 511 [95 S.Ct., at 2211]." *Simon v. E. Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 40, 96 S.Ct. at 1925; *see Common Cause v. Democratic Nat'l Comm.*, 333 F.Supp. 803, 809 & n.11 (D.D.C. 1971). National Women's Health Network, Inc., ARM and Nassau-NOW are devoted to promoting women's rights, including the right to a legal abortion. Given the political orientation of this organizational purpose, these entities have powerful claims to represent voter-members "uniquely, or even predominantly, injured" by the challenged government conduct. *Ripon Society v. Nat'l Republican Party*, 525 F.2d 567, 573 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). In any event, the organizational plaintiffs' standing will depend upon their members' satisfaction of the requirements of voter's standing, and the groups' participation in the case cannot "lessen the controversy, or blur the presentation of issues . . . in any way." *Id.* at 574.

The other organizational plaintiffs nowhere allege that they or their members engage in any political activity or that they are involved in affecting the legislative process in any substantial manner. In the absence of such allegations, these organizations have no standing to represent their members' interests under the voter standing doctrine.

tributions for the same candidate were to be treated as gifts to the committee and not to the candidate. Plaintiffs, a nonprofit corporation promoting tax reform and one of its members, alleged that the revenue ruling was illegal because it permitted individuals to donate unlimited sums and to escape gift taxes by donating $3,000 increments to separate committees which served only to funnel the money to central committees for the particular candidate. *Id.* at 891. Focusing on the corporate plaintiff's membership in applying the standing tests, the court noted that the named member was "a taxpaying citizen, voter and small contributor to election campaigns." *Id.* at 898. As such, plaintiff asserted that the challenged ruling substantially diminished "his ability to affect the electoral process and to pursuade elected officials to adopt policies and programs he favors" by increasing the influence of a favored class of large contributors. *Id.* Applying constitutional standing doctrine to these circumstances, the court held that alleged diminution of one's vote and dilution of the ability to affect the electoral process "are judicially recognized wrongs and are thus sufficient allegations of actual injury." *Id.* at 899

Two Illinois voters, one a political candidate, the other a supporter, had standing to challenge the patronage system in Cook County because of the alleged injury to their interest "in an equal chance and an equal voice" in the election process. *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267, 269-70 (7th Cir. 1970), *cert. denied*, 402 U.S. 909, 91 S.Ct. 1383, 28 L.Ed.2d 650 (1971). Since that interest is protected by the federal constitution, impairment thereof gives standing to the victims of the challenged practices. *Id.* at 269; *see Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1328 (N.D. Ill. 1979) (granting summary judgment to plaintiffs).

Finally, in *Common Cause v. Democratic National Comm.*, *supra*, a non-profit public interest corporation,

its chairman (a voter) and two elected politicians sought declaratory and injunctive relief against several national committees of political parties. Plaintiffs alleged that those groups circumvented the statute placing limits on individual campaign contributions. 333 F.Supp. at 806. The government's failure to prosecute these alleged violations resulted in the dilution of plaintiffs' participation in the voting process. *Id.* at 808. The court could find no "serious impediment to the plaintiffs' standing." *Id.*

Grounded in the equal protection safeguards of the fifth, rather than the fourteenth, amendment, plaintiffs' claims seem barely distinguishable from those involved in *Baker*. Both cases center on allegations that some arbitrary government action diluted the strength of voters in one group at the expense of those in another. Plaintiffs' injury is no less real because they claim discrimination based on issues rather than geography, nor is it relevant that the impact of allegedly harmful government conduct is felt during the battle over choosing representatives rather than in the number of representatives technically available to the aggrieved voters. The bottom line is that plaintiffs have alleged government action which has improperly biased the political process against the discrete group to which they belong.

Defendants contend that *Shakman*, *Shultz* and *Common Cause* incorrectly applied the concept of voter standing as set forth in *Baker v. Carr*. *Baker*, it is said, requires a showing of mathematical dilution of voting strength as a prerequisite of voter standing. Such precision supposedly is necessary to establish concrete personal injury.

The rationale of *Baker's* standing analysis cannot be so restricted. *Baker*, the three subsequent decisions and the case at bar all concern allegations that some arbitrary government action impaired one group's ability to affect the political process in preference to a more favored group. The injury to oppressed voters is as distinct and palpable here as in any of the previous cases.

The precision with which an injury can be defined is irrelevant to the concreteness of the injury, but that factor may affect considerations of causation or redressability. Defendants contend that the imprecise allegations of harm in the complaint mask its inadequate showing that defendants' actions have caused the harms plaintiffs allege or that an alteration or threatened alteration of the church defendants' tax status will ameliorate plaintiffs' injuries. Defendants' arguments, however, mischaracterize the complaint as objecting to the church's political activity *per se* and seeking relief in the form of a legislatively guaranteed right to abortion.

Plaintiffs have asserted a more circumscribed grievance and request. They do not demand a discontinuation of the church's political activity, nor do they seek, through the court, to prevent the election of antiabortion candidates. Plaintiffs claim that allegedly unconstitutional government conduct and illegal private conduct have distorted the electoral and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations. Plaintiffs do not complain of diminished representation and do not demand increases in actual representation. They complain of arbitrary government interference that disfavors them in the process of selecting representatives.

Viewed, as such, there can be no question that, even in the absence of a mathematically demonstrable injury, the complaint satisfies the causation and redressability requirements. Clearly, the government defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of. An injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate. The standing question is unaffected by the church defendants' possible

resolve to continue their current rate of political activity despite a decision requiring application of § 501(c)(3) to them and it is unaffected by plaintiffs' ultimate chances of success in their drive to preserve or expand women's rights to choose to complete or to terminate a pregnancy. That the court cannot guarantee plaintiffs' success in the political arena does not signify that the plaintiffs cannot gain anything from this litigation. On the contrary, plaintiffs have the opportunity to redress what they perceive is a grievous imbalance in the electoral and legislative process. It is sufficient for purposes of standing that "the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976) (emphasis added) . . . He need not show that a favorable decision will relieve his every injury." *Larson v. Valente, supra*, 102 S.Ct. 1682 n.15; *accord, id.* at 1695-96, 1696 n.6 (Rehnquist, J. dissenting).[10]

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[10] The cases concerning challenges to the validity of the census which defendants rely upon, are inapposite to an application of standing doctrine to the particular voter claims here. Plaintiffs in those actions alleged that "the votes of persons in some states or regions will be diluted in comparison to those in" other areas if the census was not performed in accordance with strict constitutional mandates. *See Fed'n for Am. Immigration Reform v. Klutznick supra*, 486 F.Supp. at 566; *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968, 92 S.Ct. 1188, 31 L.Ed.2d 243 (1972). Standing was denied in those cases because plaintiffs could not show that they were among those who had sustained the injury or that apportionment in the manner sought would redress the injury. These shortcomings were due to the unique nature of the census methods of apportionment.

"[B]ecause of the way our method of apportionment operates" it was "impossible" for plaintiffs in *Fed'n for Am. Immigration Reform* to demonstrate that concrete harm would occur from the inclusion of illegal aliens in the census count. 486 F.Supp. at 570. Assuming that such inclusion would be unconstitutional and would result in a misallocation of some Congressional seats, the court could envision no way in which individual voters could show "which

3. *Equal Protection Standing.* Plaintiffs contend that in addition to having standing based upon injuries to rights guaranteed by the establishment clause and to their right to equal participation in the electoral process, they have standing based upon injuries to rights conferred by the equal protection provisions of the fifth amendment.

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states might gain and which might lose representation." *Id.* at 567-70. Plaintiffs' complaint, thus, was fatally speculative in that it could not include an allegation that any plaintiffs would be affected by the challenged government conduct. *Id.* at 570. In other words, a given voter has no standing to challenge conduct which will injure some unknown and unknowable group of voters. *See id.* at 571.

In *Sharrow*, plaintiff was faced with an exceedingly burdensome, but not impossible, pleading problem. In order to show that his injury might be redressable, he needed to perform "a state-by-state study" of the effects of the claimed impropriety in the census procedures. 447 F.2d at 97. Only such analysis could show that New York was underrepresented as alleged and without this analysis he could not "establish that the failure to enforce [Section 2 of the Fourteenth Amendment] has resulted in a detriment to his rights of representation." *Id.*

The pro-choice plaintiffs need not demonstrate that the alleged discriminatory enforcement of § 501(c)(3) has resulted or will result in a specific loss in the number of pro-choice legislators, and are likely to be injured. The *Sharrow* requirement is inapplicable they are not suing merely as members of a group, some of whom because these plaintiffs allege unequal ability to *participate* in the electoral process, not actual loss of representatives vis-a-vis other groups, and they seek a non-discriminatory enforcement of the laws, not an increase in the number of offices available. The court can act upon their injury and demands without the type of statistical information required to prove injury and to structure relief in a census case. Unlike plaintiffs in *Fed'n for Am. Immigration Reform*, these voters all allege particular personal injury. This is no general claim that the census will come out "wrong" and thus harm some voters and help others. Rather, these plaintiffs allege that *all* prochoice voters, candidates and contributors have suffered the injury complained of and will benefit from the relief requested. Assuming the truth of their pleadings, each plaintiff in this category has shown particular interests at stake and likelihood of benefiting from the relief sought.

The thrust and importance of this argument are unclear. Having satisfied the requirements for establishment clause and voter standing, plaintiffs can press their claims of illegal disparate treatment. Thus it appears that the so styled "equal protection" standing would not enhance plaintiffs' position. Moreover, plaintiffs have not alleged any facts that state an injury to rights conferred by the fifth amendment alone. They do not assert that the Code has been applied to them discriminatorily or that they have been denied some tax benefits to which they are entitled. The differential treatment of plaintiffs and the church that plaintiffs complain of creates a legally cognizable injury only in conjunction with plaintiffs' first amendment claims. Their acknowledgement that the Code has been applied properly to them concedes that they have not been injured, in purely fifth amendment terms, by the alleged misapplication to the church defendants. Viewed from this perspective, their "equal protection" claim is reduced to an assertion that the federal defendants are acting improperly. *Schlesinger v. Reservists Comm. to Stop the War*, *supra*, 418 U.S. at 216-22, 94 S.Ct. at 2929-2932, and *Valley Forge*, *supra*, 102 S.Ct. at 764 make clear that individuals without a personal stake, distinct from that of the public generally, in the government's observance of the law do not have standing to complain of government malfeasance. Merely asserting, as plaintiffs have done, that the government has disregarded the law in its treatment of a third party does not confer standing.

B. *Prudential Concerns*

The twenty individual plaintiffs and three of the organizational plaintiffs, ARM, NWHN and Nassau-NOW have satisfied the Article III requirements for voter standing. In addition, the clergy plaintiffs and the Women's Center have satisfied those constitutional prerequisites for establishment clause standing. Before a

final decision on these parties' standing can be rendered, however, they must demonstrate that the court should not decline to confer standing because of prudential considerations. The Supreme Court has identified three such prudential limitations that will defeat the standing of a plaintiff who has satisfied the Article III case or controversy requirements. Where "the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure," the exercise of federal jurisdiction is not warranted. *Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 80, 98 S.Ct. at 2634. Access to federal courts may be denied also when a plaintiff seeks to assert the legal rights to a third party. *Id.* Finally, the judiciary should avoid hearing "abstract questions of wide public significance [when] other governmental institutions may be more competent" to do so. *Warth v. Seldin, supra*, 422 U.S. at 500, 95 S.Ct. at 2205.[11]

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[11] Defendants suggest that as part of the prudential limits on standing plaintiffs must show that they are within the "zone of interests" that § 501(c)(3) protects. Plaintiffs fail this zone of interests test, defendants maintain, because Congress never intended § 501(c) to preserve government neutrality in the electoral process. The structure of § 501(c) creates inequality among organizations depending upon the exemption for which each qualifies. For example, § 501(c)(3) organizations enjoy tax exemptions and the right to receive tax-deductible contributions at the cost of foregoing all electioneering and limiting their lobbying efforts to an insubstantial part of their activities; § 501(c)(4) organizations are not subject to these stringent requirements but they too are ineligible for tax-deductible contributions; and § 501(c)(19) must observe few restrictions on their political endeavors while enjoying tax benefits equivalent to those conferred on § 501(c)(3) groups. Plaintiffs' standing, however, is not undermined by the fact § 501(c)(3) is not a general safeguard against tax policy induced economic distortions of the political marketplace because the zone of interests, or nexus text, applies only to taxpayer suits. *See Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 78-80, 98 S.Ct. at 2633-2634. Plaintiffs already have conceded that they do not have taxpayer standing. *See* note 1, *supra*. The failure of § 501(c) to preserve neutrality in government intervention into

These prudential factors do not dictate barring plaintiffs' opportunity to proceed with this lawsuit. Although a large number of citizens likely share the injuries alleged by the clergy under the establishment clause and by the voters and abortion rights organizations under the first and fifth Amendments, these are not "generalized grievances" such that there will by any lack of sharp controversy. Standing is not a doctrine to restrict access to the courts, and prudential concerns should not be so applied if the court is satisfied that plaintiffs bring a live and pointed controversy to it. *See, e.g., Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 80-81, 98 S.Ct. at 2634-2635 ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested" prudential concerns generally do not bar standing); *United States v. SCRAP, supra*, 412 U.S. at 687-88, 93 S.Ct. at 2415-2416 ("standing is not to be denied simply because many people suffer the same injury.") Standing rules should be invoked to ensure that the court will adjudicate only an actual case or controversy and that, as an adversarial rather than an inquisitorial tribunal, it will be fully apprised of the facts and relevant law by a vigorous and interested presentation from the litigants. There is not the slightest reason to believe that the wide dispersion of plaintiffs' injuries will diffuse the contest before the court.

The prudential limitation on standing when rights of third parties are implicated avoids "adjudication of rights which those not before the Court may not wish to assert . . . [and assures] that the most effective advocate of the rights at issue is present to champion them. *See Singleton v. Wulff*, 428 U.S. 106, 113-14, 96 S.Ct. 2868,

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the political process has caused the United States Court of Appeals for the District of Columbia Circuit to declare the statutory scheme in violation of the Constitution. *See Taxation with Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir. 1982) (en banc).

2873-2874, 49 L.Ed.2d 826 (1976)." *Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 80, 98 S.Ct. at 2634. This lawsuit does not present the potential problem of a disinterested plaintiff advocating the interests of persons not before the court. Plaintiffs do not predicate their standing on the narrow *jus tertii* exceptions to the general rule that litigants must assert their own rights. The action, therefore, involves no rights that the rightholder would not wish to assert or that the plaintiffs are likely not to press vigorously.

The final prudential hurdle restricts access to judicial forums to resolve abstract policy questions of broad public importance. Courts erect this barrier from their awareness of the judiciary's limited competence to resolve societal, as opposed to personal, disputes and the superiority of other mechanisms to make complex social choices. Not all issues of broad public importance, however, are necessarily, or even better, left to the executive and the legislature. Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy.

III

Defendants urge dismissal, even if plaintiffs do have standing, because the complaint does not state a claim upon which relief may be granted. Defendants contend

that plaintiffs' injuries, such as they are, do not amount to actionable wrongs either as establishment of religion or unconstitutional vote dilution. The church defendants further argue that regardless of the vitality of the complaint, it states no claim against them and that, therefore, they should be dismissed.

Plaintiffs are permitted to proceed "unless it appears beyond doubt that [they] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Measured by this standard, counts two and three of the complaint certainly are adequate and the motion to dismiss them for failure to state a claim must be denied. Counts one and five, however, are fatally defective and must be dismissed. Plaintiffs have voluntarily withdrawn count four.

In count two of the amended complaint, plaintiffs allege that by granting the Roman Catholic Church a uniquely favored status under the tax code, the government defendants have violated their duty, arising under the first amendment, to treat all religious organizations similarly. In recent years, the Supreme Court has set out a three part test to determine establishment clause violations. A challenged government action withstands establishment clause scrutiny "if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653, 100 S.Ct. 840, 846, 63 L.Ed.2d 94 (1980): *accord*, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111-2112, 29 L.Ed.2d 745 (1971); *Brandon v. Bd. of Education*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, —— U.S. ——, 102 S.Ct. 970, 71 L.Ed.2d 109 (1982).

It is not implausible that plaintiffs will be able to adduce facts that demonstrate that the government fa-

voritism allegedly shown to the defendants lacks secular purpose or that this preferential treatment advances the cause of the Roman Catholic Church. If plaintiffs are successful in either of these tasks, they will have demonstrated an actionable establishment clause violation. The difficult evidentiary burdens that plaintiff must shoulder to prove these allegations do not, by themselves, justify dismissal.[12]

Defendants place undue reliance on *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), in their argument that the tax benefits plaintiffs complain of do not rise to the level of actionable injuries. In *Walz*, there was no assertion of preferential treatment of one religion to the detriment of others. *See id.* at 673, 90 S.Ct. at 1413; *id.* at 689, 90 S.Ct. at 1421 (Brennan, J., concurring); *id.* at 696, 90 S.Ct. at 1425 (Harlan, J., concurring). The dictum, "[t]here is no genuine nexus between tax exemption and establishment of religion[,]" *id.* at 675, 90 S.Ct. at 1414, and the accompanying distinction between the transfer of funds to churches and abstaining from collecting taxes from them, *id.* at 674-75, 90 S.Ct. at 1414-1415, are applicable only in the context of a nondiscriminatory tax deduction extended broadly to social welfare organizations. In that circumstance, the state, by declining tax collection from all churches, observes the "wholesome neutrality" commanded by the establishment clause; taxing church property or income while all other private corporations operated for the public benefit were granted an exemption would constitute hostility to religion that the first amendment forbids. *Walz v. Tax Comm'n of the City of New York, supra*, 397 U.S. at 696-97, 90 S.Ct. at

[12] The neutrality of the statute itself, of course, does not immunize defendants if they apply that statute in a manner that favors one religion over all others. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 271-73, 71 S.Ct. 325, 327-328, 95 L.Ed. 267 (1951).

1425-1426 (Harlan, J., concurring). When, as here, the government conditions that tax advantage on abstinence from the political arena, but waives that condition for a single religious group, the waiver, rather than the exemption itself, runs afoul of the constitution. Even if the "tax subsidy" granted through § 501(c)(3) is not establishment *per se*, the preferential treatment shown to one religious group carries the appearance of an improper endorsement of sectarian belief.

In count three, plaintiffs allege a violation of their fifth amendment rights to due process, including equal protection of the law, by the government defendants' failure to revoke the church's § 501(c)(3) status. The gravamen of this claim is the adverse impact on the plaintiff's political voice that results from the government's financial sponsorship of the plaintiffs' opponents in a bitter public controversy. *Baker v. Carr*, *supra*, and it progeny confirmed that individuals have a right to equal participation in the electoral process and to be free from arbitrary government action that favors the political strength of some persons relative to others. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 554-68, 84 S.Ct. 1362, 1377-1384, 12 L.Ed.2d 506 (1964); *Shakman v. Democratic Organization of Cook County*, *supra*, 435 F.2d at 270; *Tax Analysts and Advocates v. Simon*, *supra*, 376 F.Supp. at 899. The defendants concede the existence of this right, but they argue that it is limited to protection against mathematical dilution of the vote. This reiteration of the argument made against the plaintiffs' claim of voter standing fails for the reasons similar to those found to support that standing. *See* pp. 480-483, *supra*. The *Baker* opinion evinces no indication that the right it recognized is factbound to the circumstances of the case. If the plaintiffs can prove that the government defendants have conferred a financial benefit on the church and that the benefit disadvantages the plaintiffs in electoral contests, then the plaintiffs will have made a prima facie case for relief. Congress is not free to subsidize the lobbying or elec-

tioneering activities of one group while arbitrarily denying the subsidy to others. *Taxation with Representation of Washington v. Regan, supra,* at 716. Similarly, the administrators of our laws are not free to condition the grant of a subsidy upon total abstinence from campaigning and minimal engagement in lobbying and then, without reason, to exempt one group from that requirement while allowing it the subsidy.[13]

In count five, plaintiffs seek a writ of mandamus to compel the government defendants to enforce the Code against the church defendants. It is firmly established that ordinarily mandamus relief is available only to compel ministerial administrative actions. *See e.g., Leonhard v. Mitchell,* 473 F.2d 709, 712-13 (2d Cir.), *cert. denied,* 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1002 (1973); *Lovallo v. Froehlke,* 468 F.2d 340, 343, 345-46 (2d Cir. 1972), *cert. denied,* 411 U.S. 918, 93 S.Ct. 1555, 36 L.Ed. 2d 310 (1973). It is equally accepted that discretion permeates IRS tax assessment and collection decisions. *See e.g., Bob Jones Univ. v. Simon,* 416 U.S. 725, 749-50, 94 S.Ct. 2038, 2052-2053, 40 L.Ed.2d 496 (1974); *American Ass'n of Commodity Traders v. Dep't of Treasury,* 598 F.2d 1233, 1235 (1st Cir. 1979). Accordingly, mandamus is an inappropriate remedy in this action.

Count one states simply that "[t]he activities of the Roman Catholic Church violate § 501(c)(3) of the Code and the First Amendment to the Constitution." This count fails to state a claim against the church defendants because they are incapable of violating the first amendment and they have breached no duty imposed by the Code and to plaintiffs.

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[13] The court makes no judgment at this time on the appropriate standard of review for these claims. The Court of Appeals for the District of Columbia Circuit recently applied the strict scrutiny test to claims, analogous to those at bar, that § 501(c) of the Code facilitated the speech of some persons over others. *See Taxation with Representation of Washington v. Regan, supra,* at 723-731.

The constitutional prohibition against establishment of religion prohibits government activities that enhance the status of one theology over all others or the status of religious beliefs and organizations generally over non-religion. Like all other protections afforded by the Bill of Rights, this stricture does not restrict purely private corporate action. Admittedly, the line between the public and the private is indistinct and, some say, vanishing, but the activities of the Roman Catholic Church, as alleged in the amended complaint, do not even approach this disputed border. Therefore, no action can proceed against the church defendants based on their abridgement of plaintiffs' first amendment, guaranteed rights.

The complaint also fails to state a violation of § 501 (c)(3) by the church defendants. They have received a determination letter from the IRS that confirms their tax-exempt status. Even if, as plaintiffs contend, that letter was erroneously or illegally issued, the church is entitled to rely upon it and withhold payment of taxes. The Code imposes no duty upon the church to gain pre-clearance from the IRS before embarking on activities that might trench upon the § 501(c)(3) prohibitions against political activity. If the church does engage in these proscribed endeavors, then it is liable to revocation of its exemption, but as long as it holds that exemption, it cannot be said to have violated the Code.

Moreover, the plaintiffs, by their own admission, have no direct grievance with the church defendants. The injuries set out in the complaint arise from illegal and unconstitutional government action. Plaintiffs concede that they do not seek to terminate the Roman Catholic Church's political program; they desire to place the church on an equal footing with themselves in the political battle over the right to choose to have an abortion. The disadvantage plaintiffs suffer comes from government indifference to church excesses and it is against the government, not the church, that plaintiffs have stated a claim.

IV

Defendants' final assault on the action flows from statutory and common law prescriptions against judicial review of plaintiffs' claims. Defendants contend that the doctrine of non-reviewability of certain administrative or prosecutorial decisions precludes consideration of the action. In addition, defendants maintain that Congress has explicitly excluded lawsuits such as this from those in which injunctive or declaratory relief is available.

A. *Reviewability of Administrative or Prosecutorial Discretion*

As a general rule, courts will review administrative actions in the absence of a clear and convincing showing of contrary legislative intent. *Eastern Ky. Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1285 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Medical Comm. for Human Rights v. Sec. & Exch. Comm'n*, 432 F.2d 659, 666 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510, 18 L.Ed.2d 681 (1967). Tempering this presumption is the recognition of a generous grant of discretion to the executive, particularly in decisions to prosecute law violators. *See, e.g., Marshall v. Jerrico*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); *Kixmiller v. Sec. & Exch. Comm'n*, 492 F.2d 641, 645 (D.C. Cir.) (1974).

This action fits much more closely within the rule allowing review than the rule excluding it. No statute explicitly bars all judicial review of IRS decisions concerning taxpayer status.[14] To the contrary, Congress re-

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[14] As discussed *infra*, pp. 489-90, the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1976), and the Declaratory Judgment Act, 28

cently added to the Code a section explicitly permitting judicial review of IRS decisions denying an organization § 501(c)(3) status. *See* Pub. L. 94-455, Title XII, § 1203(b)(2)(A), 90 Stat. 1690 (1976), codified at 26 U.S.C. § 7428 (1976).[15] The jurisdictional restrictions contained in this section of the Code—limiting § 7428 suits to taxpayer actions for declaratory relief—do not undermine the inference that Congress recognizes the *competence* of the judiciary to reevaluate and where necessary to supervise IRS decisions concerning the award of § 501(c)(3) status. There is no significant difference in the decisional task presented to the courts in determining whether an organization has improperly been denied an exemption and in determining whether it has improperly been granted one. Both decisions require consideration of complex federal revenue collection policies. Both require delving into the nature of the taxpayer, its expenditures and its activities. Neither is susceptible to simple application of rules to facts.

Defendants place undue reliance on the doctrine of non-reviewable prosecutorial discretion. Their most compelling argument draws upon the deference courts show to executive decisions to allocate law enforceemnt resources in a manner that the executive deems most efficacious. Offsetting this resource efficiency argument, however, is the consistent judicial intervention into prosecutorial decisions that fail "to promote the ends of justice and den[y] rights conferred upon a citizen by the Constitution and by federal law." *NAACP v. Levi*, 418 F. Supp. 1109, 1116 (D.D.C. 1976); *see Nader v. Saxbe*,

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U.S.C. § 2201 (Supp. IV 1980) restrict the scope of remedies available in tax related controversies. Neither of these statutes, however, can be construed as a blanket preemption of judicial review of taxpayer status. They are limitations on remedies only.

[15] Section 7428 authorizes certain organizations whose application for tax-exempt status is denied or revoked to bring an action for judicial declaration of the organization's entitlement to the exemption. *See* 26 U.S.C. § 7428 (1976).

497 F.2d 676, 679 n.19 (D.C. Cir. 1974); *Adams v. Richardson*, 480 F.2d 1159, 1166 (D.C. Cir. 1973). Moreover, this action is distinguishable from the ordinary instance of unreviewable prosecutorial discretion where the executive must choose from among many malfeasors those against whom it will enforce the law. Here, by contrast, the plaintiffs seek to compel the government to conform its actions to the law. They do not sue, for example, under a statute that criminalizes certain private behavior nor do they complain that the executive has failed to penalize a third party's violation of that statute. Rather plaintiffs allege that the IRS has illegally acted to bestow a tax benefit upon an unqualified organization. Plaintiffs do not seek to force the executive to expend its resources to prosecute a law violator; they are using their own resources to compel the government defendants to observe Congressionally and constitutionally imposed strictures on defendants' official actions. In sum, this case presents almost none of the circumstances that give rise to judicial deference to prosecutorial discretion.

B. *The Anti-Injunction Act*

The Code expressly prohibits, with certain exceptions not relevant here, all "suit[s] for the purpose of restraining the assessment or collection of any tax . . ." 26 U.S.C. § 7421(a) (1976). Defendants contend that this litigation falls within the prohibited category.

Reference to the words of the statute alone places plaintiffs' case beyond its purview. The complaint seeks an injunction commanding, not forbidding, the collection of taxes. Peering behind the words provides no greater support for defendants' position.

This section of the Code, known as the Anti-Injunction Act, apparently has no recorded legislative history. *Bob Jones Univ. v. Simon, supra*, 416 U.S. at 736, 94 S.Ct. at 2045. Courts have interpreted the statute as ". . . the protection of the Government's need to assess and collect

taxes as expeditiously as possible with a minimum of preenforcement judicial interference . . ." *Id.*; *see Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962). Defendants argue that this government need to ensure an unimpeded flow of revenue can be frustrated by suits, such as the case at bar, that challenge taxpayer status and compel tax collection because such suits place demands upon the IRS equivalent to actions to restrain collection. This argument is not without some merit, particularly because a successful third party action compelling tax assessment will likely be followed by a taxpayer suit under 26 U.S.C. § 7428 seeking a declaration of entitlement to an exemption. Such litigation over the right of an organization to enjoin certain privileges under the Code has the potential to encumber substantial IRS resources even if it does not directly interfere with the flow of revenue.

The majority of the courts that have considered the scope of the Anti-Injunction Act, however, have declined to interpret its prohibitions as broadly as defendants suggest. The consistent theme in these decisions is that the statute only extends to those actions it expressly refers to and that its effect is to require that taxpayers who object to the payment of taxes pay the assessment and sue for a refund. *See, e.g., Wright v. Regan*, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (Dec. 12, 1981) (No. 81-970); *Tax Analysts and Advocates v. Shultz*, *supra*, 376 F. Supp. at 891-92; *Eastern Ky. Welfare Rights Organization*, *supra*, 506 F.2d at 1284; *McGlotten v. Connally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972) (three judge court). Persuasive reasoning supports these decisions. Third party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present because third party suits are " 'few and far between[.]' " *Wright v. Regan*,

supra, 656 F.2d at 836 n.52. The Anti-Injunction Act would have a draconian effect beyond what Congress explicitly required if it were applied in these circumstances because it would foreclose any relief to third parties injured by executive decisions not to assess or collect taxes. The taxpayer who is unable to prevent collection because of the Act has open to it an alternative avenue of relief —a suit for refund. Plaintiffs here, and any person having a right to complain of another's lack of tax liabilities, by contrast, would have no means of redress if the Act preempted this lawsuit. *See Bob Jones Univ. v. Simon*, *supra*, 416 U.S. at 746, 94 S.Ct. at 2050; *National Restaurant Ass'n v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976); *McGlotten v. Connally*, *supra*, 338 F. Supp. at 453-54. In light of the clear language of the statute and the strong and compelling authority limiting application of the statute to actions to restrain tax collection, plaintiffs are not barred from proceeding by the Anti-Injunction Act.

C. *The Declaratory Judgment Act*

In addition to their prayer for an injunction, plaintiffs seek a declaration that defendants have violated the Code and Constitution. The Declaratory Judgment Act confers jurisdiction on the court to issue such relief "except with respect to [controversies concerning] Federal taxes other than the actions brought under Section 7428 of the Internal Revenue Code of 1954, . . ." 28 U.S.C. § 2201 (Supp. IV 1980).

Conceding that they cannot bring a § 7428 action, plaintiffs change hats from those of the strict constructionists who advocated a literal reading of the Anti-Injunction Act to those of contextualists who argue that that statute and the Declaratory Judgment Act share the same purpose and thus should be interpreted to be coextensive. Plaintiffs' only support for this proposition is dicta from several opinions that interpreted the two

laws as "coterminous." *McGlotten v. Connally*, *supra*, 338 F. Supp. at 453; *see Bob Jones Univ. v. Simon*, *supra*, 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7 (Declaratory Judgment Act restriction is "at least as broad as the Anti-Injunction Act"). Plaintiffs' authorities do not support the broad proposition that any tax case ripe for injunctive relief also is ripe for declaratory relief; those cases stated only that it appeared that Congress intended to exclude from the Declaratory Judgment Act *at least* those cases, other than § 7428 actions, that could not be brought because of the Anti-Injunction Act. *See Bob Jones Univ. v. Simon*, *supra*, 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7.

Declaratory relief and injunctive relief are two different forms of the courts' remedial powers; there is no inherent reason that the two should be interpreted as equal in scope. Congress extended the Declaratory Judgment Act and created the § 7428 remedy in response to the *Bob Jones Univ.* decision. *See* S. Rep. No. 94-938, 94th Cong., 2d Sess. 586-87, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4010-11. Nothing in the wording that Congress chose to allow these taxpayer suits for a declaration of a right to § 501(c)(3) status indicates that it desired to define the scope of the available remedy in terms of judicially recognized exemptions to the Anti-Injunction Act. The different purposes of the declaratory and injunctive remedies--the former allows a litigant to seek an order from the court before subjecting itself to liability, for example, by not paying taxes, while the latter more often is invoked to terminate ongoing injurious activity—suggests that the absence of cross-references between the Declaratory Judgment and Anti-Injunction Acts resulted from a conscious tailoring of each to the circumstances Congress thought most befitting. The Anti-Injunction Act, by its narrow wording, permits suits to compel collection of taxes; such suits will be brought by parties whose tax status is not in dispute in the litigation and who, as plaintiffs here,

can have standing only if they can show that a third party's privileged tax status imposes on them a discrete and palpable injury. At that point the opportunity for a declaration of rights would be surplusage. The party seeking to adjudicate its own tax status presents a very different injury, the denial of an exemption from future taxation. A declaration of its right to the exemption can prevent it from suffering any permanent damage, but allowing such a party to seek an injunction would interrupt collection of federal revenues and thereby promote the principal mischief Congress sought to prevent through the Anti-Injunction Act. This analysis supports defendants' position that no declaratory relief is available to plaintiffs.

V

Pursuant to the preceding discussion, the motion to dismiss is granted in part and denied in part. The church defendants motion to dismiss themselves from the lawsuit is granted. Plaintiffs Laurel Clinic, Inc., The Federation of Feminist Women's Health Center, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc., and Women's Health Services, Inc. are dismissed for lack of standing. The motions to dismiss the other plaintiffs are denied. The twenty individual plaintiffs have standing as voters to contest the alleged infringement of their right to participate in the political process on equal terms with all others and free from arbitrary government interference. ARM, Nassau-NOW, and the National Women's Health Network, Inc. have standing to represent their voter-members injured by the challenged government conduct. In addition, the clergy plaintiffs and the Women's Center for Reproductive Health have satisfied the requirements to bring an action complaining of an unconstitutional establishment of religion. The motions to dismiss for failure to state a claim upon which relief may be granted or because the action is barred by the Anti-

Injunction Act or the doctrine of administrative discretion are denied. The court finds that the Declaratory Judgment Act does not authorize relief in this action.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE

Feb. 27, 1985

OPINION

ROBERT L. CARTER, District Judge.

This renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is based upon the recent Supreme Court decision in *Allen* v. *Wright*, —— U.S. ——, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The question presented is whether and to what extent the *Allen* opinion affects the outcome reached by the court in *Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (Carter, J.) ("*ARM*"), with which familiarity is assumed. *ARM* held that the clergy plaintiffs and the Women's Center for Reproductive Health had standing under the establishment clause, and

that 20 individuals and three tax-exempt organizations had standing as voters in this litigation.[1]

The Supreme Court held in *Allen* that a nationwide class of parents of black children attending public schools in districts undergoing desegregation, but who had not actually been denied entry to allegedly discriminatory private schools, did not have standing to challenge the tax exempt status of those schools.

In applying *Allen* to the present case it must first be noted that the Court did not close the door on private suits challenging government grants of tax exemption, *see Allen*, 104 S.Ct. at 3332 (noting possible propriety of standing in *Coit v. Green*, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971), *summarily aff'g. sub nom., Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), which made allegations comparable to those in *Allen* but with different facts), but used traditional analysis in concluding that the *Allen* plaintiffs lacked standing.

The Court held that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 104 S.Ct. at 3325. This is an integral part of the precedent upon which both *Allen* and *ARM* were decided. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed.2d 700 (1982); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). Separation of powers, as *Allen*, 104 S.Ct. at 3330 n.26, clearly demonstrates, is not a distinct line of analysis but serves as the basis of the "traceability" part of the traditional

[1] As a further result of *ARM*, five of the original plaintiffs, all abortion clinics, were denied standing for failure to show injury in fact and two of the original defendants, the United States Catholic Conference and the National Conference of Catholic Bishops, had the complaint against them dismissed since they were incapable of violating the First Amendment and had not violated the Internal Revenue Code in light of an explicit tax exemption from the IRS.

three part standing test of personal injury fairly traceable to the defendants allegedly illegal conduct which is likely to be remedied by the requested relief. *Id.* at 3325.[2]

More specifically, plaintiffs in *Allen* asserted two types of damage: the first was characterized as either a generalized injury based upon the government's behavior in granting tax exemptions to the schools or as denigration suffered by all blacks as a result of government discrimination. In either case, the Court found the harm to be insufficiently personal to constitute a justiciable cognizable injury. *Id.* at 3326. The second alleged injury was the children's diminished ability to receive an education in a racially integrated school. *Id.* at 3328. This was found wanting because desegregated schooling was not fairly traceable to the allegedly illegal conduct of the IRS. *Id.* at 3326.

A

While it is clear that stigmatizing injuries are the sort of noneconomic wrongs caused by government conduct that sometimes can be sufficient to support standing, *Heckler v. Mathews*, 465 U.S. ——, ——, 104 S.Ct. 1387, 1395, 79 L.Ed.2d 646 (1984), such status is accorded only to those who can allege a resultant harm to a concrete, personal interest. *Allen*, 104 S.Ct. at 3327-328. The *ARM* decision used this analysis to find that the lay and organizational plaintiffs did not have standing while the clergy plaintiffs and the Women's Center for Reproductive Health, a church affiliated guidance service, asserted a "compelling and personalized" injury, *ARM*, 544 F.Supp. at 479, that "diminishes their position in the

[2] While the "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated as two facets of a single causation requirement, both *Allen* and *ARM* treat them as distinct inquiries for analytical purposes. *Allen*, 104 S.Ct. at 3326 n.19; *ARM*, 544 F.Supp. at 478. The same practice will be followed here.

community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message." *Id.* at 480. Such allegations meet the test enunciated in *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), that would-be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n.9, 83 S.Ct. at 1572 n.9.

Personal injury, however, is not enough. Plaintiffs must also clear the two additional hurdles of the standing test. This court in *ARM*, found plaintiffs' establishment clause injury to be traceable to defendants' conduct because "[t]acit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries." *Id.* at 480. The court therefore found plaintiffs' asserted injuries to be traceable to "official approval of an orthodoxy antithetical to [plaintiffs'] spiritual mission." *Id.*

> Their injury flows directly from the federal defendants allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

Id.

This finding is consistent with *Allen*. *Allen* holds that tax exemption granted to an organization that allegedly practices an illegal activity does not in itself constitute the necessary connection between government action and injuries that flow from the activity. The lack of desegregated schooling, defined in *Allen* as a cognizable injury, was not found directly traceable to government action.

"From the perspective of the IRS, the injury to respondents is highly indirect and 'results from the independent action of some third party [i.e., the discriminatory private school] not before the court.'" *Allen*, 104 S.Ct. at 3328, quoting, in part, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). The Court stated that if a direct link between tax exemption and desegregation could be established, i.e., if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration, then the alleged injury would be fairly traceable to unlawful IRS grants of tax exemptions. *Allen*, 104 S.Ct. at 3328.

Similarly, redress of the establishment clause injury sustained in *ARM* does not depend upon any action by a third party. Redress will come directly from the government's consistent enforcement of the tax laws, not from any change in the political activities of the Church. Plaintiffs' establishment clause injury centers on the quasi-official imprimatur accorded the anti-abortion activities of the Church through tax exemptions and the restrictions placed on the establishment clause plaintiffs' political activities by § 501(c)(3). Whether the allegations can be proved is not a question for this court now to decide since it must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979).

It is thus apparent that *Allen* supports the court's earlier decision which denied standing under the establishment clause to those plaintiffs who, similar to those in *Allen*, asserted only general claims of denigration, but which granted standing to those plaintiffs who could pass the three part test of distinct personal injury, direct traceability, and possible redress by defendants.

B

As pointed out in the earlier opinion, it has consistently been held that voters have standing to contest the alleged infringement of their right to participate in the political process on equal terms with all others free from arbitrary government interference. *ARM*, 544 F.Supp. at 480-481 citing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (plaintiffs' unjustifiable inequality vis-a-vis voters in other counties justified standing); *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315 (N.D.Ill.1979) (standing granted to challenge patronage system because of the alleged injury to plaintiffs' interest in an equal chance and an equal voice in the election process); *Tax Analysts and Advocates v. Shultz*, 376 F.Supp. 889 (D.D.C. 1974) (non-profit corporation and one of its members granted standing to challenge revenue ruling concerning campaign gifts because alleged diminution of one's vote and dilution of the ability to affect the electoral process are judicially recognized wrongs and are thus sufficient allegations of actual injury); *Common Cause v. Democratic National Committee*, 333 F.Supp. 803 (D.D.C.1971) (allegations that several national committees of political parties circumvented the statute placing limits on individual campaign contributions, thereby diluting plaintiffs' participation in the voting process, were sufficient to find standing).

Here again, mere personal injury is not enough. Defendants argue that *Allen's* yardstick in regard to traceability and redressability require that voter standing be denied in this case. Defendants, however, misconstrue the basis for the *ARM* holding that voter standing requirements have been met. The injury to plaintiffs is not, as defendants state, "alleged politicking by the Catholic Church." *Defendants' Memorandum of Law in Support of Their Renewed Motion to Dismiss* at 15, but the alleged arbitrary inequality of the plaintiffs in the political

process vis-a-vis the Catholic Church created by the IRS's grant of tax exemption to the latter. The judicially cognizable injury in *Allen* was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in *ARM* is unequal footing in the political arena, a condition completely traceable and within the control of the IRS. The *Allen* analysis and *ARM*'s are, therefore, as one and the court's earlier holding granting standing to the present plaintiffs remains unaffected by *Allen*.

C

Moreover, in *ARM*, the successful plaintiffs were found to have surmounted the three prudential limitations that can defeat standing even when the Article III case or controversy standards are met. *ARM*, 544 F.Supp. at 484. The three prudential limitations preclude standing when: (1) the harm asserted amounts to only a generalized grievance shared by a large number of citizens in a substantially equal measure, (2) plaintiffs assert the rights of third parties, or (3) abstract questions of wide public significance are presented when other governmental institutions may be more competent to decide them.[3] *Id.* (citations omitted). *Allen* does not reach these issues, but its analysis is fully congruent with *ARM*'s treatment of these considerations.

Concerning the "generalized grievance" limitation, *ARM* full analyzed the specificity of the remaining plaintiffs' injuries, distinguishing the harm to clergy plaintiffs and the Women's Center for Reproductive Health from that complained of by the excluded plaintiffs as well as plaintiffs in, *e.g.*, *Valley Forge Christian College v. Amer-*

[3] The "zone of interests" test was held to be inapplicable to the *ARM* context since that test applies only to taxpayer suits and plaintiffs concede that they do not have taxpayer standing. *ARM*, 544 F.Supp. at 484 n.11; *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-79, 98 S.Ct. 2620, 2633-2634, 57 L.Ed.2d 595 (1978).

icans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, L.Ed.2d 700 (1982). *ARM*, 544 F.Supp. at 4477-480, 484. Voter standing is also particularized since plaintiffs, despite articulated desires to be politically active on behalf of their pro-choice views, can not do so without risking their valuable § 501(c)(3) status. This personal denial of equal treatment is precisely the type of standing required by *Allen* since parent plaintiffs in that case "were not personally denied equal treatment by the challenged discriminatory conduct." *Allen*, 104 S.Ct. at 3327.

The question of whether plaintiffs are addressing other parties' rights was answered squarely in the negative by *ARM*, 544 S.Supp. at 485. Since no assertion otherwise is made by defendants and *Allen* is silent on the issue, the previous ruling need not be disturbed.

Finally, there is the matter of whether other governmental institutions may be more competent to decide this issue. As stated in *Allen* and noted in defendants' briefs, the separation of powers doctrine.

> counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch and not to the Judicial Branch the duty to 'take care that the laws be faithfully executed.' U.S. Const. Art. II, § 3. We could not recognize [plaintiffs'] standing in this case without running afoul of the structural principle.[26]

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[26] . . . [O]ur analysis of this case does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable. . . . Rather we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement.

Allen, 104 S.Ct. at 3330.

Whether courts provide an appropriate forum for deciding the matter presented thus implicates questions considered in the Article III analysis. This dovetailing of constitutional and prudential concerns was explicitly recognized by *Allen*:

> Case or controversy considerations, the Court observed in *O'Shea v. Littleton*, . . . 414 U.S. [488,] 499, 94 S.Ct. [669], 677[, 38 L.Ed.2d 674 (1974),] 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.' . . . Most relevant to this case is the principle articulated in *Rizzio v. Goode* . . . 423 U.S. [362,] 378-379, 96 S.Ct. [598,] 607-608[, 46 L.Ed.2d 561 (1976)]:
>
> 'When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs,' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896[, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230] (1961), quoted in *Sampson v. Murray*, 415 U.S. 61, 83[, 94 S.Ct. 937, 949, 39 L.Ed.2d 166] (1974). *Id.*

In addition to the previously discussed finding of direct harm to plaintiffs and its traceability to defendants' actions, *ARM* further addressed this final prudential concern of limiting judicial activity to the enforcement of "specific legal obligations whose violation works a direct harm," *Allen*, 104 S.Ct. at 3330, by holding that:

> Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress has already made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress' commands concerning taxes and engaging in political ac-

> tivity. The prudential barriers do not restrict a court from adjudicating a claim merely because of the interplay between the litigation and social controversy.

ARM, 554 F.Supp. at 485

For the above stated reasons, defendants' renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is denied.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1486—August Term 1988

On petition for rehearing Decided: October 4, 1989

Docket No. 86-6092

IN RE: UNITED STATES CATHOLIC CONFERENCE and NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Appellants,

ABORTION RIGHTS MOBILIZATION INC., LAWRENCE LADER, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMENS HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU, INC., RABBI ISRAEL MARGOLIES, REVERNED BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, WOMENS CENTER FOR REPRODUCTIVE HEALTH, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW and SUSAN SHERER,

Plaintiffs-Appellees,

—v.—

JAMES A. BAKER, III, Secretary of the Treasury, and ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,

Defendants.

Before:

NEWMAN, KEARSE, and CARDAMONE,
Circuit Judges.

PER CURIAM:

Appellants have sought rehearing, alleging inconsistency between the opinion in this case and an opinion issued by another panel in *Fulani v. League of Women Voters Education Fund*, No. 88-6243 (2d Cir. Aug. 2, 1989). In *Fulani*, competitor standing was accorded to a political candidate to challenge her exclusion from a televised debate in which her political rivals were invited to participate. A majority of the panel concluded that she suffered sufficient injury to establish standing. In the present case, though this panel is divided as to whether the plaintiffs are sufficiently in competition with the Catholic Church to have suffered injury that confers standing, we are in agreement that the competition in *Fulani* is more direct and immediate than that shown here.

The petition for rehearing is denied.

No. 89-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Petitioners,
v.
UNITED STATES CATHOLIC CONFERENCE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS UNITED STATES CATHOLIC CONFERENCE AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do abortion-rights advocates, whose own tax status is not at issue, have standing to challenge the tax exemptions of over 30,000 Roman Catholic Church entities?

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BRIEF OF RESPONDENTS UNITED STATES CATHOLIC CONFERENCE AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case omits two important points. First, it neglects to mention the supplementary, *per curiam* opinion issued by the court of appeals panel in this case when it denied the petition for rehearing. That opinion squarely rejects

petitioners' assertion, at pages 33-37 of their present petition, that the panel's decision conflicts with another decision of that same court, *Fulani* v. *League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989).[1] In denying rehearing, the panel unanimously announced that, although it was "divided as to whether the plaintiffs are sufficiently in competition with the Catholic Church to have suffered injury that confers standing, [it was] in agreement that the competition in *Fulani* is more direct and immediate than that shown here." Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 86a; see *infra*, at 20-22. The panel thus denied rehearing.[2]

Second, petitioners' statement omits a sufficient description of their complaint and of the subpoenas they served upon respondents United States Catholic Conference and National Conference of Catholic Bishops ("USCC/NCCB").[3] Petitioners seek an injunction ordering the government to "revok[e] the tax exemption of the Roman Catholic Church," on

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[1] In fact, pages 33-37 of the petition for a writ of certiorari are taken largely verbatim from the petition for rehearing in the court of appeals.

[2] Petitioners do include the opinion as the last item of their appendix, but they never mention its existence, nor even list it in the "Opinions Below" section of their petition. Indeed, petitioners' only references even to their *petition* for rehearing are in the Jurisdiction section of their petition, and in the final footnote, where they speculate, without discussing the existence of a written opinion, what "appears" to have motivated the court of appeals to deny their petition. Petition for a Writ of Certiorari, at 35 n. 12.

[3] The United States Catholic Conference and National Conference of Catholic Bishops are distinct organizations with identical memberships. Each is composed of all active Roman Catholic Bishops in the United States.

the purported ground that some or all of its over 30,000 separate entities have engaged in impermissible political activities. Amended Complaint ("Am. Compl.") ¶ 60.[4] The affected Church entities, all of which are covered by an annual group exemption letter, include not only respondents USCC/NCCB, but also virtually every Catholic diocese, parish, elementary and high school, college, seminary, hospital, home for the aged or infirm, orphanage, counseling center, monastery, retreat house, and refugee assistance group in the country.[5] Petitioners' complaint also seeks an order requiring the IRS to assess and collect all resulting back taxes, and to notify the Church's contributors that they may not claim charitable tax deductions for their contributions. *Ibid.*

The petitioners allege no IRS enforcement actions, or threatened enforcement actions, against themselves personally or against their churches or organizations. Nor do they seek tax refunds or any change in their tax status. Their amended complaint alleges only, "[u]pon information and belief, . . . [that] Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country . . . ." Am. Compl. ¶ 25. It further alleges, again "[u]pon information and belief," that "[m]any Catholic priests and other Church officials . . . have, from their pulpits, regularly and repeatedly urged their congregants to donate to 'right-to-life' committees and po-

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[4] See Joint Appendix in No. 87-416 ("JA"), at pages 5-19.

[5] The group ruling, which is issued to the USCC, covers all entities listed in *The Official Catholic Directory*, including more than 185 dioceses, 19,546 parishes, 7,485 elementary schools, 1,408 high schools, 238 colleges, 645 hospitals, and numerous other Catholic entities. See JA at 24-27.

litical parties, to obtain (often in the church parking lot following the service) 'right-to-life' campaign literature, to sign the nominating petitions of 'right-to-life' candidates. At least one church has distributed 'right-to-life' leaflets with the church bulletin." *Id.* ¶ 26. Petitioners allege that a policy statement adopted by the NCCB in 1975, the Pastoral Plan for Pro-life Activities,[6] is the "blueprint for the Church's illegal activities." *Id.* ¶ 21.[7]

Pursuant to this complaint, petitioners served subpoenas *duces tecum* on USCC/NCCB, demanding the production of voluminous internal Church documents relating to the Church's position on abortion and to its communications with the IRS. The subpoenas demanded, among other things: (1) all drafts of the 1975 Pastoral Plan, which states the U.S. bishops' theological, moral and social position on abortion, (2) the minutes of the bishops' discussions of the Pastoral Plan's proposed contents, and all documents relating to its implementation; (3) all "Church Bulletins, clergy Bulletins, Pastoral letters, directives, memoranda, or similar documents issued or promulgated by any" bishop in the United States to any other person concerning the Pastoral Plan; (4) all documents reflecting contact with any candidates for public office anywhere in the United States; (5) all documents reflecting financial support or "involvement" of USCC/NCCB, "or any state Catholic conference, archdiocese, diocese, or parish church," or any "church personnel" (defined to include every em-

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[6] The language in the 1975 Pastoral Plan of which the petitioners complain was amended in 1985.

[7] USCC/NCCB, of course, concede neither the truth of the factual allegations of the complaint nor the validity of the legal conclusions.

ployee of each of those organizations), with twelve national and state pro-life organizations; (6) USCC/NCCB's tax or information returns and, "without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service" of any application for section 501(c)(3) status; and (7) the identities of the presidents and executive secretaries of the Catholic conferences in sixteen states, and the identities of the bishops and directors of pro-life activities in eighteen dioceses for the years 1975 to the present. See Joint Appendix in No. 87-416, at pages 70-71.

USCC/NCCB declined to comply with those subpoenas, asserting, *inter alia*, that petitioners lacked standing to sue and the district court therefore lacked judicial power to issue and enforce subpoenas. The district court held that the petitioners had standing to sue and held USCC/NCCB in contempt, fining them a total of $100,000 per day for each day the subpoenaed documents were not produced. The fines were stayed pending appeal.

The court of appeals initially affirmed the contempt judgment without resolving USCC/NCCB's challenge to the petitioners' standing. The court held that USCC/NCCB, as witnesses, lacked standing to challenge the plaintiffs' standing. *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987). This Court reversed and remanded, directing the court of appeals to determine whether the plaintiffs had standing to challenge the Church's tax exemption. *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). On remand, the court of appeals held that the petitioners lacked standing to sue, vacated the contempt

judgment against USCC/NCCB, and ordered that the complaint be dismissed. Pet. App. 1a.

Petitioners moved for rehearing, alleging that the court of appeals' decision created an intra-circuit conflict with *Fulani, supra.* The panel rejected that contention and denied rehearing in a unanimous, *per curiam* opinion. Pet. App. 85a-86a. The Court later denied rehearing *en banc.* That order, which is omitted from petitioners' appendix, notes that no judge requested a vote on petitioners' suggestion. A copy of the order is included as an appendix to this brief. The present petition followed.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION ACCORDS WITH THIS COURT'S DECISIONS REJECTING THIRD-PARTY TAX CHALLENGES.

Lawsuits challenging the tax status of others "are rarely if ever appropriate for federal-court adjudication." *Allen* v. *Wright*, 468 U.S. 737, 760 (1984). That is so for two reasons. First, private plaintiffs are seldom, if ever, able to claim a direct injury based on the government's alleged failure to enforce the tax code against another. Second, judicial inquiries into the tax status of third parties (in this case, 30,000 of them), accompanied by all the discovery devices of civil litigation, would disrupt the elaborate statutory framework established by Congress for enforcing the tax code. That framework includes authorization for declaratory judgment actions determining an organization's eligibility for a tax-exemption under section 501(c)(3), but such an action "*may be filed . . . only by the organization the qualification or classification of which is at issue.*" 26 U.S.C. § 7428(b)(1) (emphasis added); see also 28 U.S.C. § 2201(a).

The petitioners ignore the two decisions by this Court that are most relevant to their petition—the two cases in which the Court has considered, and denied, standing to challenge another entity's tax exempt status, *Allen* v. *Wright*, *supra*, and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Together, those cases establish that " 'litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges.' " *Allen*, 468 U.S. at 748-49, quoting 656 F.2d 824, 828 (D.C. Cir. 1981).

In *Simon*, which petitioners fail to cite, various indigent persons challenged a revenue ruling that a non-profit hospital could qualify for recognition as a charitable organization under § 501(c)(3), even though it provided only emergency room services to those unable to afford hospitalization. This Court acknowledged the plaintiffs' interest in obtaining hospital services, and even acknowledged that some plaintiffs had been injured by the hospitals in question. *Id.* at 40-41. Nevertheless, the Court held that those facts were insufficient to establish a case or controversy with the Treasury. It was "purely speculative," the Court explained, whether the alleged denial of medical services to indigents "fairly can be traced to [the IRS's action] or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43. "[E]qually speculative" was the question whether a judgment against the IRS would cause the hospitals to provide more free services or instead to forego their tax exemptions. *Id.* at 43. Thus, the plaintiffs failed " 'to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective

relief [would] remove the harm.'" *Id.* at 45, quoting *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975).

In *Allen*, which the petitioners cite only for the general proposition that separation of powers principles underlie the standing requirements, this Court held that parents of black public school children lacked standing to challenge the lawfulness of the IRS's grant of tax exempt status to allegedly discriminatory private schools. The plaintiffs in *Allen* claimed that they had standing because the government's administration of the tax laws "diminished [their childrens'] ability to receive an education in a racially integrated school." 468 U.S. at 756. The Court recognized the "serious" nature of that injury, and "the constitutional importance of curing" it, but held that the injury could not support standing because it was "not fairly traceable to" the challenged granting of tax exemptions. *Id.* at 756-57. It was "entirely speculative," the Court explained, "whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758. It was "just as speculative whether any given parent would decide to transfer [his or her] child to public school" as a result of the school's loss of its tax-exempt status. *Ibid.* And it was "pure speculation" whether a sufficiently large number of such decisions would be made in order to have a "significant impact on the racial composition of the public schools." *Ibid.*[8]

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[8] This Court has likewise denied standing, outside of the tax context, to private individuals seeking to challenge government decisions not to prosecute a third party. In *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), the court denied standing to a woman who wished to challenge the nonprosecution of her child's father for failure to pay child support. It was

The plaintiffs in *Allen* also alleged that they were denigrated "by the mere fact of Government financial aid to discriminatory private schools." *Id.* at 752. This Court rejected the notion that standing could be predicated upon such a generalized claim of stigma. It held that "[t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing . . . . Our cases make clear, however, that such injury accords a basis for standing *only to those persons who are personally denied equal treatment* by the challenged discriminatory conduct." *Id.* at 755 (emphasis added, internal quotations, citations omitted).

The court of appeals in this case correctly held that petitioners had "not pleaded that they were personally denied equal treatment," and that they had failed to claim any "particularized injury in fact." Pet. 24a. Consequently, it never reached the question whether petitioners' alleged injuries were fairly traceable to the IRS or redressable by a judgment against the IRS. Pet. App. 26a. It is plain, however, that petitioners' claim of injury fails on these grounds as well.

Petitioners claim that their political effectiveness has been impaired by what they allege to be the Church's subsidized political activity. But here, as in *Simon* and *Allen*, "[s]peculative inferences are necessary to connect [petitioner's alleged] injury to the challenged actions of [the IRS]." *Simon*, 426

"only speculative," Justice Marshall wrote for the Court, that such prosecution would result in the payment of support. *Id.* at 618. And "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

U.S. at 45. It is speculative whether, or to what extent, the Church's donors would reduce their contributions if the Church's tax exemption were revoked. As plaintiffs themselves allege, contributions to the Church are "religiously-compelled," Am. Compl. ¶ 26, and therefore may not be responsive to tax pressure. It is equally speculative whether the Church would decide to stop the religiously motivated activities that are under attack, such as "distribut[ing] 'right-to-life' leaflets with . . . church bulletin[s]," *id.* ¶ 46, and whether, even if it did, its members would not feel an obligation to fill the void. Finally, it is speculative in the extreme whether all of the foregoing would lead to fewer pro-life votes.[9]

In short, it is true here, as it was in *Allen* and *Simon*, that

> [f]rom the perspective of the IRS, the [plaintiffs' claimed] injury . . . is highly indirect and "results from the independent action of some third party not before the court . . . ."

Allen, 468 U.S. at 757, quoting *Simon*, 426 U.S. at 42.

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[9] Petitioners have effectively conceded as much, arguing that it is "irrelevant . . . whether the Church will continue to be active politically or if its members will increase their donations" in the event of a judgment in petitioners' favor. See Respondents' Brief in Opposition in No. 87-416, at 54. But if a judgment against the IRS would not alter the alleged political activities of the Church and its contributors, then the petitioners would gain nothing other than the psychological pleasure of knowing that the Church has lost something—its tax exemption. And as this Court has made clear, such vindictive pleasure alone is insufficient to support standing. *Allen*, 468 U.S. at 754; *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 482-87 (1982); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217, 226-27 (1974).

Of course, the fact that the Church entities whose alleged political activities have allegedly injured the plaintiffs, and whose tax status is at issue, are "not before the court," *ibid.*, ensures that a judgment in the plaintiffs' favor would accomplish virtually nothing. Because the Church entities are not parties, they would not be bound by any judgment. They would be entitled to litigate their tax-exempt status *de novo* in a separate declaratory judgment action under 26 U.S.C. § 7428. That fact only underscores the inappropriateness of allowing this case to go forward.

In short, there is nothing surprising or noteworthy about the court of appeals' decision in this case. In fact, a contrary decision would have worked a minor revolution in the law.[10]

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

In an attempt to find something about the court of appeals' decision to warrant this Court's attention,

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[10] The lower courts also have been nearly unanimous in rejecting third-party challenges to tax exemptions. See *Khalaf* v. *Regan*, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D.D.C. 1985), *aff'd*, No. 83-02963 (D.C. Cir. Sept. 19, 1986) (unpublished opinion) (individuals and non-exempt political advocacy groups lack standing to claim that tax-exempt status accorded to Jewish organizations disadvantaged them in pursuit of their political objectives); *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (travel agents lack standing to challenge the tax exempt status of the American Jewish Congress for engaging in competitive business activity allegedly prohibited by § 501(c)(3)). The sole exception is another opinion of the Second Circuit that the panel in the present case unanimously held did *not* conflict with its opinion. See *supra*, at 2, *infra* at 20-22 & n.17.

petitioners argue that the decision conflicts with standing decisions of this Court in cases having nothing to do with third-party tax challenges. None of the petitioners' supposed "conflicts" withstands scrutiny.

A. *Baker* v. *Carr*

The lower court's decision plainly does not conflict with *Baker* v. *Carr*, 369 U.S. 186 (1962). Unlike the plaintiffs there, petitioners here do not allege any diminution in their representation. Nor do they allege gerrymandering, ballot-box-stuffing, outright denial of their right to vote, or anything else that dilutes the strength of their votes.[11] Petitioners have thus suffered no injury to their right to *vote*, and the court of appeals correctly held "that *Baker* v. *Carr* and its progeny are inapposite and provide no basis for granting standing to these plaintiffs." Pet. App. 21a.

As the court of appeals recognized, the petitioners here do not actually rest their claim of standing upon their status as voters. Rather, they claim standing as "political participants" or "competitive advocates," whose effectiveness has allegedly been impaired by a "distortion in the political process." As the petitioners see it, the content—or, more precisely, the balance—of the political debate has been tilted by the government's alleged failure to revoke the Catholic Church's tax exemption. This claim of "distortion in the political process" is a far cry from the direct impairment of the right to vote that supported the plaintiffs'

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[11] Cf. *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Karcher* v. *Daggett*, 462 U.S. 725 (1983); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900); *United States* v. *Saylor*, 322 U.S. 385 (1944).

standing in *Baker* v. *Carr* and its progeny. And no decision of this Court provides the slightest support for such a standing claim. To the contrary, this Court has rejected comparable claims of standing, based on alleged distortions of political processes, in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), and *United States* v. *Richardson*, 418 U.S. 166 (1974).

In *Schlesinger*, a group of self-described "citizens" complained that allowing Armed Forces Reserve members to sit in Congress violated the Incompatibility Clause of the Constitution, which states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., Art. I, § 6, cl. 2. The alleged injury was a distortion of the political process in the form of "undue influence by the Executive Branch" on Reservist Members of Congress. 418 U.S. at 212. That allegation, the Court held, although concededly a matter in which citizens have "an interest," was "too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Id.* at 226-27.

In *Richardson*, the Court denied standing to a taxpayer who wished to challenge a provision of the Central Intelligence Agency Act of 1949 that permitted the Agency's budget to be kept secret. The plaintiff in *Richardson* argued that such secrecy violated Art. I, § 9, cl. 7 of the Constitution, which provides in part, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The plaintiff's alleged injury was a distortion of the political process —he claimed that "without detailed information on CIA expenditures . . . he [could] not . . . properly

fulfill his obligations as a member of the electorate in voting for candidates seeking national office." 418 U.S. at 176. This Court held that alleged impairment insufficient to confer standing.[12] The "distortion in the political process" that petitioners allege here is no less amorphous than the alleged distortions found insufficient in *Schlesinger* and *Richardson.*

The court of appeals' decision also agrees with those of other courts of appeals. In *Winpisinger* v. *Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the United States Court of Appeals for the District of Columbia Circuit held that supporters of Senator Edward Kennedy for the Democratic presidential nomination lacked standing to claim that members of President Carter's administration had illegally spent federal funds to promote the

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[12] *Ex parte Levitt*, 302 U.S. 633 (1937), is to the same effect. In that case, a citizen and member of this Court's bar sought to challenge the President's appointment and the Senate's confirmation of Justice Black as a violation of Art. I, § 6, cl. 2 of the Constitution, which provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . ." Seating a constitutionally ineligible Justice on this Court would quite arguably "distort" the judicial process. Nevertheless, this Court unanimously denied Mr. Levitt's motion for a writ of *quo warranto*, and held that it "is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S. at 634. See also *Richardson*, 418 U.S. at 177-78 (summarizing *Levitt*).

President's renomination. The plaintiffs' alleged harm was "the dilution of their efforts on Senator Kennedy's behalf by the actions of the federal defendants in utilizing the vast resources available to the Administration to promote President Carter's quest for renomination." *Id.* at 138. The Court held that there was no fairly traceable causal connection between the claimed injury and the challenged conduct. It explained that

> [t]he endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is "fairly traceable" to any particular event. In the case before us, whether [a plaintiff] is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to [the defendants]. Courts are powerless to confer standing when the causal link is too tenuous.

Id. at 139.

Likewise, in *Shakman* v. *Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988), the Seventh Circuit denied standing to candidates and voters challenging the politically motivated hiring of government employees in Chicago. Like the petitioners here, the plaintiffs there alleged that the challenged action "created . . . inequality in the treatment of communication," "giving the appellants a significant advantage in the process of communicating with the

electorate." *Id.* at 1396. The Seventh Circuit rejected that claim as an insufficient basis for standing. *Id.* at 1397.

The court of appeals in this case thus broke no new ground when it held that the "distortion" of the political process alleged by the petitioners is insufficient to give them standing.

B. Establishment Clause Cases

Petitioners claim that the court of appeals' decision conflicts generally "with this Court's definition of injury in Establishment Clause cases." Pet. 28. It does no such thing.[13]

Under the Establishment Clause, petitioners say, the "injury is the discrimination itself." Pet. 29. But that is nearly identical to the claim expressly rejected by this Court in *Allen*. There, the plaintiffs claimed that the "mere fact of Government financial aid to discriminatory private schools" caused a "stigmatizing injury." 468 U.S. at 752, 755. This Court rejected that claim, and held that "such injury accords a basis for standing *only to those persons who are personally denied equal treatment* by the chal-

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[13] Petitioners also include in their question presented the issue whether they have standing as taxpayers. But they do not elaborate on that claim in their petition itself. The court of appeals' decision that they lack such standing, Pet. App. 17a-19a, is both eminently correct and thoroughly unremarkable. Unlike the plaintiffs in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), plaintiffs here do not challenge § 501(c)(3), or any other statute, either on its face or as applied. Instead, they argue that § 501(c)(3) is being violated, and they seek to enforce it privately.

lenged discriminatory conduct." *Id.* at 755 (emphasis added, internal quotations and citation omitted).[14]

The same standard applies with equal force under the Establishment Clause. In *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Court denied standing to individual citizens who wished to challenge the government's conveyance of surplus federal property to a religious college. The Court explicitly rejected the notion "that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted." 454 U.S. at 488 (citations omitted). Thus, the Court emphasized that a claimed "spiritual stake" in the government's alleged preference for a particular religion cannot support standing unless the plaintiffs can show that they were " '*directly affected* by the laws and practices against which their complaints are directed.' " 454 U.S. at 486-87 n.22, quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added).

The schoolchildren in *Schempp* were "directly affected" by the schools' Bible-reading programs because they "were subject to unwelcome religious exercises or were forced to assume special burdens to

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[14] The suggestion of stigma or denigration in this case (see note 15, *infra*), pales by comparison to the comparable allegation rejected in *Allen*. The plaintiffs in *Allen* complained of racial discrimination, which historically has carried with it an undeniable mark of perceived inferiority. The allegation of stigma in *Allen*, while too generalized to support standing, was nonetheless genuine. By contrast, the suggestion of "denigration" here is baseless.

avoid them." 454 U.S. at 487 n.22. By contrast, the plaintiffs in *Valley Forge* lacked standing because they

> fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

454 U.S. at 485-86 (emphasis in original). The court of appeals here correctly determined that the petitioners' complaint suffers from the same fatal defect. Petitioners have not been "personally denied equal treatment," *Allen*, 468 U.S. at 755, nor have they been "directly affected by the . . . practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 486-87 n.22. Their claim of standing rests ultimately on their assumption—unsupported by any alleged facts—that the government *would* treat them differently from the Catholic Church *if* they behaved as they say the Catholic Church has. Such speculation, however, cannot provide a basis for standing.[15]

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[15] Petitioners' statement that they are "not . . . seeking standing as 'clergy *qua* clergy' with all the negative implications" of that argument (Pet. at 32 n.10), is somewhat mystifying. That has always been their claim in the past. For example, in their previous brief on the merits in this Court, petitioners insisted that the clergy plaintiffs suffered injury "in the daily practice of [their] ministries, in their ability to gain public acceptance of their religious beliefs and to minister to their congregations' particular needs . . . ." *U.S. Catholic*

Nor does the court of appeals' opinion conflict with any of the other cases cited by petitioners. Although this Court did not address any question of standing in *County of Allegheny* v. *A.C.L.U. Greater Pittsburgh Chapter*, 109 S.Ct. 3086 (1989), or *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the records in those cases make clear that they were predicated upon municipal taxpayer standing, not upon the nebulous theory offered by the petitioners here. See Joint Appendix in No. 87-2050, Amended Complaint ¶¶ 2-9, 16, 23; Joint Appendix in No. 82-1256, Amended Complaint ¶¶ 1, 4-7, 14. *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890 (1989), was a challenge, under the Press and Establishment Clauses, to a statutory tax exemption enjoyed only by religious periodicals. It was brought by a secular newspaper in the context of its own demand for a tax refund. *Id.* at 895. And *Larson* v. *Valente*, 456 U.S. 228 (1982),

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Conference v. *Abortion Rights Mobilization, Inc.*, No. 87-416, Brief for Respondents at 75. And in their initial filing with the court of appeals, they quoted with approval from the district court's description of the alleged injury they suffer:

> The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws which command consideration of abortion as the morally required response to pregnancy.

Abortion Rights Mobilization, Inc. v. *Baker*, No. 85-3056 (2d Cir.), Respondents' Brief at 37.

If petitioners are now abandoning their claim of "clergy standing," it is unclear on what basis they *do* seek standing under the Establishment Clause.

was a suit brought by a religious denomination that was required by statute to file certain fundraising reports from which other religions were statutorily exempted. Here, both petitioners and respondents are equally subject to the terms of § 501(c)(3) and to all related regulations. None of the petitioners seeks a tax refund or any change in tax status. And just as the government has taken no enforcement action against USCC/NCCB, neither has it taken any against any of the petitioners.[16]

In short, not only does the court of appeals' decision not conflict with this Court's Establishment Clause precedents, it is squarely in their mainstream.

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[16] All of the Court's other Establishment Clause cases have likewise been predicated either on taxpayer standing or some other sort of direct injury. See, *e.g.*, *Jimmy Swaggart Ministries* v. *Bd. of Equalization*, 110 S.Ct. 688 (1990) (sales tax levied against religious organization); *Hernandez* v. *Commissioner*, 109 S.Ct. 2136 (1989) (taxpayers denied deduction for payments for church services); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987) (employee allegedly victimized by religious discrimination); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985) (employer required by statute to grant employees Sabbath leave); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (children subjected to religious exercise); *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (legislator subjected to legislative Chaplain's prayers); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (restaurant denied liquor license); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (public school teacher forbidden to teach evolution); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963) (schoolchildren subjected to Bible reading); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (schoolchildren subjected to prayer); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (candidate for office required to affirm faith in God); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (retail clerks convicted of doing business on Sunday).

III. THERE IS NO INTRA-CIRCUIT SPLIT IN THE SECOND CIRCUIT.

Petitioners insist that there is a conflict within the Second Circuit that warrants this Court's attention. They claim—incorrectly—that the present case is irreconcilable with *Fulani* v. *League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989). Of course, the place to resolve an intra-circuit split is in the Circuit itself, not in this Court. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). Recognizing that fact, the petitioners sought rehearing in the court of appeals on this ground, but even the dissenting judge on the panel found no conflict. See Pet. App. 85a-86a.[17]

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[17] In *Fulani*, a divided panel of the court of appeals held that an independent presidential candidate, Dr. Laura B. Fulani, had standing to challenge the tax exempt status of the League of Women Voters, which had left her out of its nationally televised candidate debates leading up to the Democratic and Republican presidential nominations. 882 F.2d at 623. Nevertheless, the court affirmed the district court's dismissal of the complaint for failure to state a claim. The Second Circuit's ruling on standing was explicitly rejected in a substantially identical suit brought by Dr. Fulani in the District Court for the District of Columbia. *Fulani* v. *Brady*, 727 F. Supp. 158 (D.D.C. 1990), *notice of appeal filed* (Feb. 27, 1990). Whichever of the two *Fulani* decisions is correct, the cases are distinguishable from this case. In *Fulani*, at least, one of the defendants, the League of Women Voters, had in fact treated the plaintiff differently from other candidates. It had denied her the opportunity to participate in its debates. Here, by contrast, there has been no unequal treatment of any of the plaintiffs by any of the defendants. Moreover, in *Fulani*, the requirements of 11 C.F.R. §§ 1.10.13, 114.4(e) (1988), that the League maintain its tax-exempt status in order to sponsor candidate debates, at least arguably supplied the elements of "traceability" and "redressability" necessary for standing—

IV. THE COURT OF APPEALS' OPINION IS NARROW AND FACT-BOUND.

Petitioners mistakenly suggest that the court of appeals' opinion is an expansive one. It is not. In fact, the court of appeals was careful to stress the narrowness of its holding: "[w]e do not foreclose the possibility that political competitors might state a cognizable injury; instead, we simply hold that the theory cannot be sustained here." Pet. App. 26a. The court explained that its decision adhered closely to "the pleaded facts and established law, and [did] not venture out any further" than was necessary. *Id.* In short, the court's opinion is both narrow and fact-bound.

What is more, the facts to which the court's opinion is bound are extreme. Petitioners are not candidates, or even supporters of candidates for any particular office, much less in any particular election. None of the petitioners is a disappointed applicant for a tax exemption of its own. None is the target of IRS enforcement activities. And none seeks a tax refund. The court of appeals deliberately decided only that *these* plaintiffs, on *this* complaint, do not have standing. It did not decide whether any of the above permutations would make a difference to its decision, and it certainly did not rule on any of the fanciful hypotheticals posited by petitioners' *amici*.[18]

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if the League lost its tax exemption, it could not sponsor a candidate debate. Here, as in *Simon* and *Allen*, it is entirely speculative whether the conduct of the Catholic Church and its contributors would change in any way, much less in a way agreeable to petitioners, in the wake of a revocation of the Church's tax-exempt status.

[18] Additional abortion-rights groups have filed an *amicus* brief supporting the petitioners. Only a few of *amici*'s argu-

CONCLUSION

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals. Instead, the court of appeals simply applied this Court's precedents to a narrow set of facts and left

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ments warrant a response. First, *amici* recite a litany of hypothetical horribles in which the IRS purposefully permits tax-exempt organizations to support candidates advocating all sorts of causes—from legalizing racial segregation to outlawing traditional religions. Brief *Amicus Curiae* of Population Planning Associates, Inc. ("Br. Am. Cur."), at 6. As noted above, the short answer to all those hypotheticals is that the court of appeals expressly refused to decide that political competitors would never have standing. It thus left many questions—including all of *amici*'s hypotheticals—for another day.

Second, it is simply inaccurate to say, as *amici* do, that this Court "expressly acknowledged" in its prior opinion in this case that the petitioners' standing "is at least 'colorable.' " Br. Am. Cur. at 15. What the Court said—in the fourth sentence of its opinion—is that the *court of appeals* in its prior opinion ruled "that a non-party witness' jurisdictional challenge is limited to a claim that the District Court lacks even colorable jurisdiction, *a standard not met here.*" 487 U.S. at 74 (emphasis added). Quite obviously, the Court was simply describing the court of appeals' ruling, not offering its own assessment of the plaintiffs' standing.

Third, *amici* announce that "in some respects, the standing of the plaintiffs in this case follows *a fortiori* from the standing of the plaintiffs" in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987). Br. Am. Cur. at 10. Hardly. In *Ragland*, the plaintiff raised its constitutional challenge to other publications' tax exemptions in the context of its own claim to an exemption and its own suit for a tax refund. See 481 U.S. at 225. The plaintiffs in *Ragland* could plausibly allege that they had been treated differently by the government by being denied the exemptions granted to the others. See also *Texas Monthly, supra*; *Regan* v. *Taxation With Representa-*

the state of the law exactly as it found it—" 'suggest[ing] that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges.' " *Allen*, 468 U.S. at 748-49, quoting 656 F.2d 820, 828 (D.C. Cir. 1981). Cf. Pet. App. 26a. Accordingly, the petition should be denied.

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tion, 461 U.S. 540 (1983). Here, no petitioner has been denied any exemption and none seeks any refund.

Fourth, *amici* mistakenly suggest that *Lujan* v. *National Wildlife Fed'n*, No. 89-640, which is currently set for oral argument on April 16, 1990, is somehow relevant to this case. Br. Am. Cur. at 20. As *amici* concede, however, "*Lujan* arises in the context of environmental litigation and is in other respects dissimilar from this case." *Ibid.* *Lujan* arises under the Administrative Procedure Act, under which prudential standing limitations play far less of a role. See *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 400 n.16 (1987). Here, however, they could well play an important role, see *Allen*, 468 U.S. at 751, and the court of appeals expressly left those prudential standing questions open. Pet. App. 26a. In addition, the governmental actions challenged in *Lujan* are formal decisions, published in the Federal Register, opening public lands to private mining interests. They are, in short, the classic sort of decisions reviewable under the APA. The only question in *Lujan* is whether the particular plaintiffs in that case are the proper parties to invoke judicial review. Here, there is no governmental action at all, merely an absence of enforcement, against petitioners or respondents. In contrast to the garden-variety challenge to administrative acts at issue in *Lujan*, the question in this case is one that is "rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S. at 760.

Respectfully submitted,

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April 6, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of November one thousand nine hundred and eighty-nine.

Docket No. 86-6092

IN RE: UNITED STATES CATHOLIC CONFERENCE and NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Appellants,

ABORTION RIGHTS MOBILIZATION INC., LAWRENCE LADER, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMENS HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU, INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, WOMENS CENTER FOR REPRODUCTIVE HEALTH, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW and SUAN SHERER,

Plaintiffs-Appellees,

-v.-

JAMES A. BAKER, III, Secretary of the Treasury, and ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,

Defendants.

A petition for rehearing [having been] filed herein by counsel for the plaintiffs-appellees, ABORTION RIGHTS MOBILIZATION INC., ET AL., and the panel that heard the appeal having denied said petition for rehearing in an opinion filed on October 4, 1989,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By /s/ Tina Eve Brier
TINA EVE BRIER
Chief Deputy Clerk

No. 89-1242

FILED
APR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Petitioners,

v.

UNITED STATES CATHOLIC CONFERENCE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF *AMICUS CURIAE* OF POPULATION PLANNING ASSOCIATES, INC., THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, AND THE WOMEN'S LEGAL DEFENSE FUND, IN SUPPORT OF PETITIONERS

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April 6, 1990

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BRIEF *AMICUS CURIAE* OF POPULATION PLANNING ASSOCIATES, INC., THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, AND THE WOMEN'S LEGAL DEFENSE FUND, IN SUPPORT OF PETITIONERS

INTEREST OF AMICI [1]

Population Planning Associates, Inc. ("PPA") is a nonprofit organization which receives a tax exemption from the Internal Revenue Service ("IRS") under 26 U.S.C. § 501(c)(3), and is eligible to receive tax-

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[1] Letters of consent pursuant to Supreme Court Rule 37.2 have been filed with the Clerk of the Court.

deductible contributions. The purposes of PPA are to provide educational support, training, counseling and technical services worldwide for population control and to assist in the dissemination of information on birth control and women's rights. PPA is dedicated to promoting public awareness of, and ensuring a woman's individual right to choose to have a legal abortion.

The National Abortion Rights Action League ("NARAL") has over 400,000 members in 40 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL is exempt from federal income tax pursuant to 26 U.S.C. § 501(c)(4) of the Internal Revenue Code, but is not eligible to receive tax-deductible contributions.

In order to raise tax-deductible charitable contributions, NARAL has established the NARAL Foundation, a nonprofit organization which engages in public education on reproductive health policy, and specifically on the importance to women of safe, legal, and accessible abortion services. The NARAL Foundation is tax-exempt under § 501(c)(3).

The Women's Legal Defense Fund ("WLDF") is a § 501(c)(3) nonprofit membership organization founded in 1971 to challenge sex-discrimination and to advance women's rights through the legal system. WLDF has worked extensively on issues of reproductive rights and has filed numerous *amicus* briefs on these issues.

Essential to their existence, *amici* must subsist on tax-deductible donations or government grants (PPA, NARAL Foundation and WLDF) and non-tax deductible donations (NARAL). In return for their tax exemptions, PPA, NARAL Foundation and WLDF must and do refrain from any attempts to electioneer, because Congress has expressly prohibited 501(c)(3) organizations from supporting political candidates. 26 U.S.C.

§ 501(c)(3). Nevertheless, given their organizational purposes, PPA, NARAL, NARAL Foundation and WLDF are deeply interested in the outsome of the national debate on abortion, which will directly affect their interests.

Amici believe that if the facts alleged in the complaint are true,[2] the Court of Appeals' decision in this case inappropriately permits the IRS—in contravention of the will of Congress—to influence the political process by providing tax subsidies to nonprofit organizations that violate their § 501(c)(3) status through electioneering activities. Failure to enforce the laws against respondents United States Catholic Conference ("USCC") and National Conference of Catholic Bishops ("NCCB")—or against *any* § 501(c)(3) entity that supports political candidates—creates an unfair advantage in the political arena. This unfair advantage causes a fundamental and palpable injury to *amici* and petitioners, who are shackled by the very laws the IRS refuses to enforce against others.

By subsidizing one potent political force, the federal government diminishes the effectiveness of that force's competitors in the political marketplace. In the context of the political process, that result is the essence of "injury in fact." *Amici* and petitioners suffer that injury.

Amici will make three arguments in support of *certiorari* that petitioners have not emphasized. First, *amici* will show that the question transcends the abortion rights context from which it arises, and is important to everyone who values a free political marketplace, because it threatens to undermine the principle of government neutrality on which all of our political institutions rest.

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[2] At this stage, of course, the Court must accept petitioners' allegations as true and draw all inferences in their favor. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

When the Executive Branch intercedes in the political marketplace to subsidize one political view that is competing for public approval with other political views, proponents of those other political views are disadvantaged, and the entire political system is distorted.

Second, *amici* will bring to the Court's attention a decision of this Court not previously cited by petitioners, *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987), which supports standing in the circumstances of this case.

Third, *amici* will argue that because the Court has recently granted review in another case involving the constitutional requirements for establishing injury in fact, *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 834 (1990), granting review in this case would enable the Court to consider that question in two quite different contexts, and would thereby facilitate the establishment of neutral principles that will help lower courts resolve standing issues in a broad range of contexts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Point I. This case presents an issue of national significance that far transcends the abortion rights context in which it arises. Of course the issue is of surpassing importance to the parties and to the millions of Americans who are deeply committed to pro-choice or anti-abortion positions. But the intensely charged context in which this issue arises should not obscure the fact that the issue is also of concern to every American who values governmental neutrality in political campaigns, or in the political marketplace. Analytically, the same standing issue presented by the facts of this case will arise whenever government uses tax subsidies to favor one political view at the expense of another. In each of those situations, the question will be whether governmental subsidy for a particular political view causes sufficient injury in

fact to proponents of opposing views to give them standing to question the legality of that subsidy.

Amici will show that the question presented by this case is not at all fact bound, or of interest only to the abortion controversy. Resolution of this question will directly and vitally affect standing to challenge a broad range of governmental subsidies that are allegedly motivated by racial, political, religious, or other impermissible governmental motives.

Point II. Amici will elaborate on a point made only briefly by petitioners: the question of standing is obviously worthy of review because the Court has previously granted review of that question in this very case.

Point III. Amici will raise a point not raised by petitioners: The Court has recently recognized that the constitutional requirements for establishing "injury in fact" merit review by granting certiorari in another case raising that question in the context of environmental litigation. *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 834 (1990). Granting review in this case would enable the Court to consider the same question from quite different perspectives, and would for that reason facilitate establishment of neutral principles that will help lower courts resolve standing questions in a broad range of circumstances.

ARGUMENT

I. THE PETITION PRESENTS A STANDING QUESTION OF NATIONWIDE IMPORTANCE THAT TRANSCENDS THE ABORTION CONTROVERSY.

The following hypothetical but directly analogous situations illustrate the range of circumstances in which this standing question could arise. First, the IRS purposefully allows a § 501(c)(3) organization to use tax-deductible contributions to campaign for political candidates who support a constitutional amendment permitting racial segregation of public schools. Would the NAACP, or other 501(c)(3) organizations who favor desegregation, have standing to challenge that subsidy? Under the Second Circuit's rationale, they would not. Second, the IRS purposefully allows a § 501(c)(3) liberal "think tank" to use tax-deductible contributions to campaign for political candidates who favor socialism and expansion of the welfare state. Would conservative think tanks, or other 501(c)(3) organizations who favor less government, rather than more, have standing to challenge that subsidy? Under the Second Circuit's rationale, they would not. Third, the IRS purposefully allows a § 501(c)(3) secular humanist organization to use tax-deductible contributions to campaign for political candidates who support a constitutional amendment outlawing religions other than secular humanism. Would respondents USCC or NCCB, or other 501(c)(3) organizations who oppose establishment of a state religion, have standing to challenge that subsidy? Under the Second Circuit's rationale, they would not.

These examples illustrate that the standing issue presented by this case is not at all fact bound, or of importance only to the abortion controversy. Every individual and every organization engaged in debate in the political marketplace is at risk that this administration, or a future administration, will skew the outcome of that debate by subsidizing the views of their political opponents. A

standing ruling that today subjects practices of respondents USCC and NCCB to scrutiny could tomorrow be their protector; a standing ruling that today insulates practices of respondents USCC and NCCB from scrutiny could tomorrow be their destruction.

It is not mere rhetoric to suggest that the principle of governmental neutrality in political campaigns is essential to our democratic institutions. Government exists to *serve* the political will of the people, not to shape it. For this reason, standing doctrines should be construed as liberally as the constitution will permit when citizens allege that government is illegally subsidizing the campaigns of their political opponents. Types and degrees of injury that might not qualify as "injury in fact" in less important contexts might nevertheless qualify when the complaint is that the electoral process has itself been skewed by illegal governmental conduct. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987).[3] Petitioners contend, and *amici* agree, that their injury qualifies as injury in fact under *current* standing doctrines. But even if that were demonstrably not so, petitioners' complaint alleges governmental wrongdoing so destructive of our political institutions that the Court should grant review to determine whether the constitution would permit less restrictive standing doctrines for cases such as this.

This is a good case for the Court to consider the type and degree of "injury in fact" that is required for stand-

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[3] In that case, even though Justice Scalia and Chief Justice Rehnquist dissented from the majority's conclusion that plaintiffs had standing to challenge a tax exemption that subsidized others, and were entitled to prevail on their First Amendment claims, they noted that they might reach a different conclusion in a case where, as here, "the subsidy pertains to the expression of a particular viewpoint on a matter of *political concern* . . . ." 107 S.Ct. at 1731 (Scalia, J., and Rehnquist, C.J., dissenting) (emphasis added). In that circumstance, they noted, it might be "appropriate" to accord "special protection" to "political speech." *Id.*

ing under Article III. At this stage of the litigation, the factual allegations are not in dispute. And petitioners clearly satisfy all of the other Article III requirements for standing. It is clear, for example, that if their injury is sufficient to constitute "injury in fact," that injury is "fairly traceable" to governmental wrongdoing, and could be "redressed" through injunctive relief courts could easily fashion.[4]

Distinct and palpable injury is suffered when the IRS subsidizes one political view at the expense of another opposing political view. In essence, the IRS is aiding political candidates who espouse positions favored by the current administration. This is how it works:

Congress has authorized § 501(c)(3) organizations that comply with statutory requirements to receive tax exemptions, and has further authorized tax deductions for contributions *to* such organizations. The tax exemptions and tax deductions are "a form of subsidy" that "has much the same effect as a cash grant to the organization . . . ." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). When this tax subsidy scheme is manipulated by the IRS so that organizations favoring one political view are permitted to engage in

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[4] The District Court found that petitioners "clearly satisfy the second and third aspects of the Article III standing test—causation and redressability," *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 480 (S.D.N.Y. 1982). Those findings were clearly correct. Petitioners request an order directing the IRS to cancel the tax-exempt status of respondents USCC and NCCB. Should petitioners prove their allegations, that relief would be within the power of the courts to grant and would eliminate the alleged wrongdoing. Lesser remedies would also be possible. The IRS could be ordered, for example, to enforce all provisions of the Internal Revenue Code equally against respondents USCC and NCCB. It is not necessary at this stage, however, to determine what relief would be appropriate, or, indeed, whether any relief would be appropriate. For present purposes it is sufficient that if wrongdoing is proved, courts could devise remedial orders that would end the wrongdoing.

electioneering activities, while other similarly situated organizations who favor a different political view are precluded from doing so, then the federal government has become a "player" in the electoral process.

The practical effect is that there is no difference between the tax subsidy scheme at issue in this case and a direct federal grant to favored political candidates. With a direct federal grant, candidate A, whose platform endorses the criminalization of abortion, would have a distinct advantage over nonfunded candidate B, whose platform supports pro-choice positions.

This example is no different from the situation alleged in this case. By failing to enforce the Internal Revenue Code, the federal government permits respondents USCC and NCCB to use tax-deductible dollars to finance their anti-abortion electoral activities. This direct government subsidy of partisan political campaigns places *amici* and petitioners at a distinct disadvantage; in effect, the federal government subsidizes the competitive advocacy of *amici*'s ideological and political opponents. The result is that *amici* and petitioners no longer participate in a fair and balanced political process.

The situation would be no different if the federal government granted tax deductions for political contributions to candidates who support anti-abortion positions, but denied tax exemptions to those who contributed to candidates with opposing points of view. Indeed, that is the effect of the alleged scheme. If a citizen named Mr. Anti Choice wanted to finance the political campaign of candidate A, who opposes abortion, he could do so directly, *or* through a contribution to respondents USCC and NCCB. If Mr. Anti Choice directly gave $1,000 to candidate A's campaign, that contribution would not be tax deductible and would actually cost Mr. Anti Choice $1,000 in after-tax dollars. But if Mr. Anti Choice gave the same $1,000 to respondents USCC and NCCB—to be used by them to

support A's campaign—that contribution would be tax deductible and would actually cost Mr. Anti Choice perhaps $750 in after-tax dollars. Thus, Mr. Anti Choice could contribute *more* than $1,000 to respondents USCC and NCCB, and still be better off in after-tax dollars than if he had contributed $1,000 directly to candidate A, and respondents USCC and NCCB could contribute $1,000 of that larger contribution to candidate A, and keep the balance for themselves. Thus, as allegedly administered by the IRS, the tax laws make it easier to raise money for the political campaigns of candidates who oppose abortion, and for the coffers of organizations who support such candidates.

Conversely, if a citizen named Mr. Pro Choice would like to finance the political campaign of candidate B, who supports the right to abortion, he could *only* do so directly. A contribution by him to 501(c)(3) organizations that favor abortion would not be passed on to candidate B. Thus, as allegedly administered by the IRS, the tax laws make it comparatively harder to raise money for the political campaigns of candidates who support abortion, and for organizations who favor such candidates.

In these circumstances, the cases cited by petitioners support their standing to question a tax subsidy for their political opponents.

In addition to the cases cited by petitioners, another decision of this Court that supports standing in this case is *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987). Indeed, in some respects, the standing of the plaintiffs in this case follows *a fortiori* from the standing of the plaintiffs in that case. In *Ragland*, plaintiff magazines challenged a tax exemption for *other* magazines which, they alleged, constituted a governmental subsidy of those other magazines. In that respect, *Ragland* and this case are similar. However, there is an important distinction between *Ragland* and this case, a distinction that was crucial to the dissent in *Ragland*, and that cuts

in *favor* of standing here. The plaintiffs in *Ragland*, unlike the plaintiffs here, did *not* contend that the exemption was politically motivated, or that the "exemption . . . is . . . available only to [organizations] that take a particular point of view on a controversial issue . . . ." 107 S.Ct. at 1731 (Scalia, J., and Rehnquist, C.J., dissenting). Furthermore, the plaintiffs in *Ragland*, unlike the plaintiffs here, did *not* contend that they directly competed with the exempt magazines (either for acceptance of their political views or for subscribers).

Nevertheless, even though the exemption at issue in *Ragland* was not politically motivated, and even though the plaintiff magazines were not direct competitors of the exempt magazines, seven justices had no difficulty concluding that the plaintiff magazines had alleged a "sufficient personal stake in the outcome of this litigation" to warrant standing. *Id.* at 1726. Standing for these plaintiffs should follow *a fortiori*.

Although Justice Scalia and Chief Justice Rehnquist dissented, their dissent focused exclusively on the merits, and it is not clear whether they disagreed with the majority's conclusion that plaintiffs had standing. Indeed, their dissent suggests they would have found standing if the government had "manipulated" the "subsidy scheme," or if the scheme "was meant to inhibit" the viewpoints of non-exempt magazines; in those circumstances, "the courts will be available to provide relief." *Id.* at 1731 (Scalia, J., and Rehnquist, C.J., dissenting).

Justice Scalia and Chief Justice Rehnquist dissented (on the merits, at least) precisely because the plaintiffs in *Ragland*, unlike the plaintiffs here, had not alleged that the subsidy scheme was politically motivated and designed to favor particular political views:

> Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the

> subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy. Political speech has been accorded special protection elsewhere. . . . There is no need, however, and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy that one might think appropriate for opposing shades of political expression.

Id. at 1731, 1732 (Scalia, J., and Rehnquist, C.J., dissenting) (citations omitted).

There is another distinction between *Ragland* and this case, but it is a distinction of form rather than of substance, and it also cuts in favor of standing, not against. In *Ragland*, the tax statute expressly exempted certain magazines from a general tax. Thus, the legislature had decided the exemption would be appropriate, and judicial review would pose the possibility of undermining that legislative judgment. The Court nevertheless found standing, and struck down that legislative judgment. Here, the tax statute expressly *denies* exemption to organizations that use tax-deductible contributions to support political campaigns. Thus, Congress has decided that tax exemption in those circumstances would *not* be appropriate; accordingly, judicial review here would not pose the possibility of undermining that legislative judgment. To the contrary, judicial enforcement of that clear statutory prohibition would implement the will of Congress. The problem in this case, of course, is that the Executive Branch has allegedly ignored the will of Congress and has granted, in effect if not in form, the very exemption from taxation for organizations that support particular political candidates Congress meant to deny.

In our system of checks and balances, courts must be respectful of the judgments of both the legislative and

executive branches. But greater deference is due the judgments of the Legislative Branch, particularly where, as here, executive branch actions are directly contrary to clear Congressional commands. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.") (footnote omitted).

Respondents might argue that petitioners should seek relief from Congress, rather than from the courts. But that could be argued in every case in which the Executive Branch violates the will of Congress. In all such cases, Congress would at least theoretically have the power, through denial of appropriations, *etc.*, to enforce its will. Where, as here, the Congressional command is clear, it would be an abdication of judicial responsibility to force Congress to spend the time and energy that would be necessary for it to enforce its will. Our system of checks and balances does not have an institutional preference for disputes between the legislative and executive branches to be resolved by those branches alone. To the contrary, precisely because judicial review would avoid friction between those branches, judicial review is particularly appropriate when the Executive Branch is allegedly violating a clear Congressional command. *See, e.g., National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973) (it is "for the courts to interpret the law" when the President impounds funds Congressionally authorized to be spent).

II. IN EARLIER PROCEEDINGS IN THIS CASE, THE COURT HAS FOUND THE SAME STANDING QUESTION RAISED BY THIS PETITION TO BE WORTHY OF REVIEW.

It is clear this case raises a question that is appropriate for review because the Court has previously granted review of that question, in this very case. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 56 U.S.L.W. 3395 (U.S. Dec. 8, 1987) (No. 87-416). Although the question was not resolved when this case was formerly before the Court, there have been no doctrinal clarifications that make the question any less important today than it was in 1987, when the Court granted review of that question. To the contrary, the "injury in fact" requirement of Article III has continued to spawn considerable confusion.

In May 1986, respondents USCC and NCCB were found in contempt for refusal to respond to court-ordered discovery as non-party witnesses in this case.[5] *See Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986), *aff'd sub nom. In Re United States Catholic Conference*, 824 F.2d 156 (2d.Cir. 1987), *cert. granted sub nom. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S.Ct. 484, *rev'd*,

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[5] In 1981, petitioners filed an amended complaint seeking declarations that the federal government had violated § 501(c)(3) of the Internal Revenue Code and the Establishment Clause of the First Amendment of the Constitution, and injunctive relief to compel the government to enforce the Code and the Constitution and to revoke the tax exemption for respondents USCC and NCCB. Following defendants' motion to dismiss for lack of standing, *inter alia*, the district court held that the clergy and voter plaintiffs had standing, but dismissed the complaint against respondents USCC and NCCB. *See Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982). On a renewed motion to dismiss for lack of subject matter jurisdiction in light of *Allen v. Wright*, 468 U.S. 737 (1984), the district court reiterated its original holding. *See Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985).

108 S.Ct. 2268 (1988). They "challenge[d] the contempt adjudication *solely* on the ground that the plaintiffs lack standing to bring the lawsuit." *In Re United States Catholic Conference*, 824 F.2d 156, 158 (2d Cir. 1987) (emphasis added); *id.* at 166. The Second Circuit ruled that respondents USCC and NCCB did not have standing to challenge the contempt citation, because the standing of the *plaintiffs* was at least "colorable," and third-party witnesses can challenge contempt adjudications "only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit." *Id.* at 165.

Respondents USCC and NCCB petitioned for certiorari and the Court granted certiorari, without restriction, on two questions. 108 S.Ct. 484 (1987). The first question was whether non-party witnesses can challenge contempt citations on the ground that the district court lacked actual jurisdiction, even if it did have colorable jurisdiction. The second question was "[W]hether private parties [*i.e.*, the plaintiffs in this case] have Article III standing to compel IRS to exercise its discretion to investigate complaints of impermissible political campaign activity by, and to revoke the tax-exempt status of, numerous religious organizations?" *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 56 U.S.L.W. 3395 (U.S. Dec. 8, 1987) (No. 87-416). The second question, of course, is the question now raised again by this petition.

The Court resolved question one, and ruled that a non-party witness cited for contempt does have standing to challenge the actual standing of the plaintiffs to sue in the underlying litigation, even when the standing of those plaintiffs is at least "colorable." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S.Ct. 2268 (1988). The Court did not resolve question two. The Court expressly acknowledged that the standing of these petitioners to sue is at least "colorable," *id.* at 2269, but remanded in order to allow the Second

Circuit an opporunity to determine whether these petitioners did in fact have standing. *Id.* at 2273.

The Second Circuit subsequently decided the standing question this Court considered, but remanded, and ruled that petitioners do *not* have standing.

The Court's recognition that petitioners' standing is at least "colorable" shows that this question is not frivolous. The Court's previous unrestricted grant of review of this same question shows that this question is an important question that should be decided. The lower courts have now had an opportunity to consider the question, and the record is complete.[6] The question is as important today as it was when the Court granted review in 1987. Accordingly, the Court should again grant review of this important question.

III. THE COURT HAS RECENTLY GRANTED REVIEW IN ANOTHER CASE INVOLVING THE CONSTITUTIONAL REQUIREMENTS FOR ESTABLISHING INJURY IN FACT, WHICH DEMONSTRATES THE IMPORTANCE OF THE QUESTION.

On January 16, 1990 the Court granted review in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 834 (1990). Although *Lujan* arises in the context of environmental litigation and is in other respects dissimilar from this case, in both cases the central question is whether the plaintiffs have shown sufficient injury in fact to constitute standing under Article III.[7]

Lower courts have had difficulty understanding the test for determining whether plaintiffs have demonstrated suf-

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[6] *See Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982); *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989).

[7] In that case, as here, the federal government contends that the allegations of the complaint do not demonstrate "injury-in-fact." Petition at 23.

ficient injury in fact to warrant standing. *See, e.g., Dellums v. Nuclear Regulatory Comm'n*, 863 F.2d 968, 971 (D.C. Cir. 1988) ("the guidance discernible from decisions of the Supreme Court on standing is less than pellucid"). Indeed, this Court has acknowledged that injury in fact requirements are not easy to articulate or apply. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984) ("the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition"). It was no doubt in part to provide guidance to lower courts and litigants in this important but uncertain area of the law that the Court granted review in *Lujan*.

Justice O'Connor has observed that the "standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Allen v. Wright*, 468 U.S. at 751-52. Granting review in this case of the injury in fact question now pending before the Court in *Lujan* would permit such comparison and would facilitate the search for neutral and understandable principles lower courts could meaningfully apply. Accordingly, *amici* urge the Court to grant review of this petition.[8]

CONCLUSION

The complaint alleges an egregious example of direct government subsidies causing injury by unfairly distorting the electoral process. By creating an uneven playing field upon which *amici* and petitioners are forced to compete with respondents, the IRS has caused them to sustain a distinct and palpable injury to themselves, and more profoundly, to the democratic process itself. The Court should grant the petition to resolve this issue of standing and to uphold petitioners' right to seek redress for their injury.

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[8] In the alternative, *amici* urge the Court to hold the petition in this case pending resolution of *Lujan*, for whatever disposition may then be appropriate.

For all the foregoing reasons, and for those set forth in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: April 6, 1990

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No. 89-1242

In the Supreme Court of the United States

OCTOBER TERM, 1989

ABORTION RIGHTS MOBILIZATION, INC., ET AL.,
PETITIONERS

v.

UNITED STATES CATHOLIC CONFERENCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether various individuals and tax-exempt organizations that support the availability of legal abortion have standing to sue the Secretary of Treasury and the Commissioner of Internal Revenue for declaratory and injunctive relief requiring the defendants to revoke the tax exemption of the Roman Catholic Church.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 885 F.2d 1020. The opinions of the district court denying the motions to dismiss (Pet. App. 35a-73a, 75a-84a) are reported at 544 F. Supp. 471 and 603 F. Supp. 970, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1989. A petition for rehearing was

denied on October 4, 1989 (Pet. App. 85a-86a). On December 19, 1989, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 1, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are various individuals and tax-exempt organizations that support the availability of legal abortion. They brought this suit in the United States District Court for the Southern District of New York, seeking to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to revoke the tax exemption of the Roman Catholic Church.[1] The amended complaint (C.A. App. 7-23) described the action as one for equitable relief "to enforce the doctrine of the separation of church and state" (*id.* at 7). It alleged that the individual petitioners are taxpayers and registered voters and that five of them are clergy of the Jewish or Protestant faiths whose religious beliefs "hold it permissible for women to choose to have abortions" (*id.* at 9-10).

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[1] The suit also named as defendants the non-federal respondents, the United States Catholic Conference and the National Conference of Catholic Bishops, which are the two principal national organizations of the Roman Catholic Church in the United States (Pet. App. 36a, 39a-40a). The USCC holds an "umbrella" exemption under Section 501(c)(3) covering numerous individual entities (including dioceses, parishes, schools, and hospitals), which are affiliated with the Roman Catholic Church in the United States (see Pet. App. 39a-40a). The district court ruled, however, that the complaint failed to state a claim against the Conferences because they were entitled to rely upon tax exemptions granted by the government. Accordingly, they were dismissed as defendants (*id.* at 64a-65a, 72a).

The amended complaint alleged that the Roman Catholic Church, using tax-deductible contributions, has "participated in political campaigns in all parts of the country," assertedly "supporting 'pro-life' and opposing 'pro-choice' candidates for public office" (C.A. App. 13). According to the complaint, the church has regularly contributed money to "right to life" groups, and its clergy have urged their congregants to do the same (*id.* at 15). The amended complaint alleged that this activity exceeds the limitations placed on organizations classified as tax-exempt under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.) (the Code or I.R.C.), but that the Secretary and Commissioner have "consistently overlooked these violations and failed and refused to perform their statutory duty to enforce the Code and the Constitution" (C.A. App. 12).[2] In particular, petitioners assert (Pet. 9 n.1) that this activity violates the prohibition in Section 501(c)(3) against "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." The complaint fur-

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[2] Section 501(c)(3) of the Code provides an exemption from federal income tax for an entity "organized and operated exclusively for religious, charitable * * * or educational purposes, * * * no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h) [which details the permissible limits of expenditures to influence legislation]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Contributions made to Section 501(c)(3) organizations are generally deductible for federal income, estate, and gift tax purposes under Sections 170, 2055, and 2522 of the Code, respectively.

ther alleged that the prohibition on political activity by tax-exempt religious organizations is required by the First Amendment in order to prohibit the "establishment of religion by the federal government" (C.A. App. 12).

The clergy petitioners claimed that the tax exemption accorded to the Church, whose views on abortion they described as "diametrically opposed" to their own, "is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere" (C.A. App. 19). According to their affidavits, the government's recognition of the Church's exemption "offends," "demeans," and "denigrates" them and their status in the community, leading them to "feel that [they] are second class citizens" whose religious tenets are less "worthy of attention" than those of the Church (*id.* at 53, 55, 59, 62, 66). All of the petitioners alleged that they are "at a significant disadvantage in the public debate on abortion," assertedly because the Church has "attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas [petitioners] cannot and have not done so," thereby enabling the Church to obtain "financial and political advantages" (*id.* at 18). Petitioners asserted that "[i]n the inherently competitive political arena an advantage granted to one competitor automatically constitutes a handicap to the others" (*ibid.*). Petitioners claimed injury to themselves "[a]s voters" on the theory that the alleged inequality of tax treatment creates a "distortion of the political process" and "impairs and diminishes" their "right to vote" (*id.* at 20).

Petitioners sought a declaration that both the political activities of the Roman Catholic Church and "the inaction" by the Secretary and the Commissioner violate the Constitution and the Internal Revenue Code.

Petitioners also sought an injunction directing the Secretary and the Commissioner to revoke the tax exemption of the Church, to assess and collect all taxes thereby made due, and to notify donors that contributions to the Church are no longer tax-deductible (Pet. App. 36a-38a, 40a-41a; C.A. App. 22-23).

2. The district court denied a motion to dismiss the suit for lack of standing (Pet. App. 35a-73a), and it subsequently denied a renewed motion to dismiss on that ground that had been based on this Court's intervening decision in *Allen* v. *Wright*, 468 U.S. 737 (1984) (Pet. App. 75a-84a). The court held that certain of petitioners have standing under one or both of two theories.

First, the district court held that the individual petitioners who are members of the clergy and the church-affiliated Women's Center for Reproductive Health have "Establishment Clause" standing (Pet. App. 43a-50a). The court stated that the clergy members "must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy" (*id.* at 49a), and that the Women's Center similarly "provides guidance to women in decision-making on issues pertaining to family life, including childbearing" (*ibid.*). The court characterized the Church's tax exemption as "tacit government endorsement" of the Church's position on abortion, and concluded that it caused a "discrete spiritual injury" to the clergy petitioners and to the Women's Center because their beliefs "are denigrated by government favoritism to a different theology," and because "official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs

their ability to communicate effectively their religious message" (*ibid.*).

Second, the district court held that all of the individual petitioners and three of the advocacy organization petitioners, as representatives of their members, have "voter standing," within the meaning of *Baker* v. *Carr*, 369 U.S. 186 (1962), to challenge "alleged government action which has improperly biased the political process against the discrete group to which they belong" (Pet. App. 53a). In the district court's view, continuation of the tax exemption "distorted" the electoral process by allowing tax deductions for donations to the Church but not for donations to politically active abortion rights groups (*id.* at 54a).[3]

3. In May 1986, the district court held the Conferences in contempt for failing to comply with discovery orders requiring them to produce extensive documentary evidence sought by petitioners. 110 F.R.D. 337 (S.D.N.Y.). The Conferences appealed the contempt order, arguing that it should be set aside because the district court lacked subject matter jurisdiction over the underlying action due to petitioners' lack of standing. A divided panel of the court of

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[3] On both occasions when it denied motions to dismiss, the district court declined to certify the standing question for interlocutory appeal under 28 U.S.C. 1292(b) (1982 & Supp. V 1987). See 552 F. Supp. 364 (S.D.N.Y. 1982). Subsequently, the court of appeals denied the government's petition for a writ of mandamus or prohibition directing the district court to dismiss the complaint for lack of standing. 788 F.2d 3 (2d Cir. 1986). The government then petitioned this Court for a writ of certiorari to review the court of appeals' order, and, alternatively, for a writ of mandamus directing the district court to dismiss the action, and the Court denied those petitions. 479 U.S. 810, 852 (1986).

appeals affirmed the contempt citations, ruling that the Conferences could bring a jurisdictional challenge to the contempt adjudication only on the limited ground that the district court lacked even "colorable" jurisdiction over the underlying lawsuit, and that the district court's assumption of jurisdiction in this case met this minimum threshold. 824 F.2d 156 (2d Cir. 1987). This Court reversed, holding that the absence of subject matter jurisdiction over the underlying action was ground for reversal on appeal of a civil contempt citation against a non-party witness, even if there existed a "colorable" basis for jurisdiction. Accordingly, the Court remanded the case to the court of appeals to determine whether the district court had subject matter jurisdiction over the underlying action. 108 S. Ct. 2268 (1988).

4. On remand, a divided panel of the court of appeals held that the contempt order must be vacated, and the complaint dismissed, because petitioners lack Article III standing to bring this lawsuit (Pet. App. 1a-33a). The majority analyzed petitioners' contentions in terms of four different asserted bases for standing—either as "clergy," as "taxpayers," as "voters," or as "competitive advocates"—and rejected each claim. The majority reasoned that the allegation of the clergy petitioners that they are "denigrated by government favoritism to a different theology," which assertedly "hampers and frustrates [their] ministries" (*id.* at 11a-12a), establishes no concrete injury in fact. The majority explained that the clergy petitioners "have not been injured in a sufficiently personal way to distinguish themselves from other citizens who are generally aggrieved by a claimed constitutional violation" (*id.* at 12a); they "can point to no illegal government conduct directly affecting their own ministries" (*id.* at 14a).

The majority rejected the claim that petitioners have standing to sue as "taxpayers" because their complaint "do[es] not challenge Congress' exercise of its taxing and spending power as embodied in Section 501(c)(3) of the Code," but rather "challenge[s] how the IRS administers the Code" (Pet. App. 19a). The majority also rejected petitioners' claim to "voter standing," reasoning that "'voter standing' as applied to this case is a misnomer" because petitioners' attack upon the government's failure to revoke the tax exemption of the Catholic Church "has nothing to do with voting" (*id.* at 20a). The court explained that there was no basis for petitioners to claim a dilution of their voting rights as in *Baker* v. *Carr*, 369 U.S. 186 (1962), or in a gerrymandering challenge (Pet. App. 20a-21a).

The majority proceeded to hold that petitioners' claim to standing as "competitive advocates" in the political arena, where they assertedly suffer a disadvantage as a result of the tax exemption accorded to the Catholic Church, fails to allege a concrete injury (Pet. App. 21a-26a). The majority explained that, in order to establish a cognizable "competitive injury," petitioners would need to plead and prove that they are themselves "competitors" or "players" in the political arena who are "personally" disadvantaged by the Church's conduct (*id.* at 21a-23a). In the majority's view, petitioners fail to meet that test because they are not running for office or otherwise directly involved in political activity; rather, they "simply advocate the pro-choice cause," and their "strongly held beliefs are not a substitute for injury in fact" (*id.* at 24a-25a). The majority also observed that petitioners' "competitor advocate" theory of standing is erroneous because it "lack[s] a limiting principle, and would effectively give stand-

ing to any spectator who supported a given side in public political debate" (*id.* at 25a).

Judge Newman dissented (Pet. App. 27a-33a). He concluded that the two petitioners that have tax-exempt status under Section 501(c)(3)—Abortion Rights Mobilization, Inc. and the National Women's Health Network, Inc.—have standing to sue as "competitive advocates" of the Catholic Church. Judge Newman maintained that sufficient "competition" exists to confer standing on those organizations because they "are abiding by the limitations of section 501(c)(3) in their advocacy on the abortion issue," whereas the Church allegedly is "violating these limitations in the advocacy of its point of view on the issue" (Pet. App. 31a). The dissent also concluded that petitioner Long Island National Organization for Women-Nassau, Inc., similarly has standing as a "competitive advocate" because it is "disadvantage[d]" vis-a-vis the Church, *i.e.*, its tax status under Section 501(c)(4) permits it to lobby and to engage in political activity, but not to receive tax-deductible contributions (Pet. App. 32a).

ARGUMENT

Petitioners offer no persuasive reason why the court of appeals' decision warrants this Court's review. They do not maintain that the decision below conflicts with any decision of another court of appeals, and clearly it does not.[4] Petitioners claim (Pet.

[4] Petitioners do contend (Pet. 33-37) that the decision of the court of appeals conflicts with its own decision in *Fulani* v. *League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989). Even if this contention had merit, which it does not, it would provide no reason for this Court to grant certiorari because such an intra-circuit conflict would be for

15-20) that "the issues in this case are of national significance," but in support of this claim they focus primarily not on the standing question presented here, but rather on the underlying merits of their complaint and on the political controversy that assertedly prompted that complaint—the debate over abortion rights. In fact, the decision below on the question presented by the petition does not break new ground; it merely applies to a particular fact situation legal principles already set forth in several decisions of this Court.

Moreover, the court of appeals is correct; its holding that petitioners lack Article III standing to bring this suit against the Secretary and the Commissioner follows directly from the relevant decisions of this Court. Whether grounded in the concerns of clergymen about First Amendment values, or in the assertions of other petitioners that their favored political candidates are disadvantaged at the polls, petitioners' allegations reduce to a complaint that the government is not properly enforcing the law against another taxpayer. Petitioners thus are attempting to have the courts supervise the Secretary's administration of the Code—in particular, his determinations and judgments with respect to the tax status accorded to

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the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioners did raise this claim of a conflict with *Fulani* in the proper forum by seeking rehearing en banc in this case, and the court of appeals expressly rejected petitioners' contention in denying rehearing (Pet. App. 85a-86a). The court stated that, "though this panel is divided as to whether the plaintiffs are sufficiently in competition with the Catholic Church to have suffered injury that confers standing, we are in agreement that the competition in *Fulani* is more direct and immediate than that shown here" (*ibid.*).

a third party. Under the precedents established by this Court, such a claim is not cognizable by the federal courts because petitioners are not seeking to redress a concrete injury that creates a "case or controversy" under Article III. Accordingly, there is no reason for further review by this Court.

1. It is well established that, in order to maintain a lawsuit in federal court, a plaintiff must "allege[] such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). That injury cannot be an "abstract" one (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974)); it must be "distinct and palpable" (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). In addition to those constitutional requirements, this Court has also recognized that the standing doctrine embraces certain prudential limitations on the exercise of federal jurisdiction, including "the general prohibition on a litigant's raising another person's legal rights" and "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Allen* v. *Wright*, 468 U.S. at 751.

The Court has emphasized that these principles generally do not permit plaintiffs to invoke the federal courts to litigate the claim that the government is failing to enforce its laws—in particular, laws gov-

erning tax exemptions—against a third party. In *Allen* v. *Wright*, *supra*, the Court observed that suits challenging the government's conduct of a particular program "are rarely if ever appropriate for federal-court adjudication" (468 U.S. at 760), and it held that the parents of black public school children lacked standing to sue the Secretary and the Commissioner to challenge the tax-exempt status of allegedly discriminatory private schools. The Court explained that the plaintiffs' complaint that the government was not adequately enforcing the tax exemption laws was not sufficient to permit the suit: "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning" (*id.* at 754, quoting *Valley Forge Christian College* v. *American United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982)). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937).

The Court then concluded that the plaintiffs had not suffered any concrete injury from the government's failure to revoke allegedly invalid tax exemptions. The Court held that the claim that blacks had suffered a "stigmatic injury, or denigration" (468 U.S. at 754) as a result of government recognition of tax exemptions for segregated schools was too abstract to be judicially cognizable. The Court also rejected the attempt to base standing on the assertion that the grant of tax exemptions to private schools impaired the desegregation of the public schools and therefore diminished the plaintiffs' ability to educate their children in an integrated school. The

Court held that the line of causation between the government's enforcement of the tax laws and public school desegregation was too weak; it was sheer speculation whether the withdrawal of tax exemptions would affect the racial balance in the public schools attended by the plaintiffs' children. *Id.* at 756-758.

In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court also found that the plaintiffs lacked standing to litigate whether the government was properly enforcing the tax laws against other persons. A group of indigent plaintiffs had sued Treasury officials to challenge a Revenue Ruling that allowed nonprofit hospitals to qualify for tax exemption under Section 501(c)(3) even if they provided indigents with no more than emergency room services. Although the Court acknowledged that some of the plaintiffs had been injured by the hospitals' relatively restrictive policy regarding services to indigents (see 426 U.S. at 40-41), the Court held that this injury did not confer standing to sue the government because it was "purely speculative" whether the alleged injury could fairly be traced to the govenment's tax enforcement ruling "or instead result[s] from decisions made by the hospitals without regard to the tax implications" (*id.* at 42-43). And in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, *supra*, the Court held that the plaintiffs lacked standing to challenge, as violative of the Establishment Clause, the conveyance of surplus federal property to sectarian institutions because the plaintiffs "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at 485). The principles embodied

in these decisions establish that petitioners here lack standing to challenge the tax exemption of the Catholic Church.

2. Petitioners do not discuss the decisions of this Court that reject standing to sue the government to revoke the tax exemption of a third party. Instead, they invoke cases recognizing plaintiffs' standing to maintain very different kinds of lawsuits, and then advance a variety of theories to try to bring themselves within the ambit of those cases. The court of appeals, however, correctly rejected each of petitioners' theories of standing.

a. Because they do not challenge any aspect of the electoral process, there is clearly no merit to petitioners' argument (Pet. 20-24) that the decision below conflicts with this Court's recognition of "voter standing" in *Baker* v. *Carr*, 369 U.S. 186 (1962). They do not allege that their vote has been diluted in any manner or that anyone has been prevented from voting. Thus, as the court of appeals held (Pet. App. 20a-21a), they "do not allege the particularized and objectively ascertainable injury in fact that sustained standing in the malapportionment cases."

The substance of what petitioners refer to as "voter standing" is the assertion they and their cause are at a competitive disadvantage in the political arena—because the Church allegedly can use tax-deductible contributions to support candidates, whereas abortion rights groups cannot (see Pet. 20-21, 24-25). This allegation is entirely inadequate to establish a basis for standing to sue. A threshold prerequisite to standing, as a "competitor" or otherwise, is that the plaintiff himself have suffered an "injury in fact" from the conduct that he challenges. See, *e.g.*, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

The claim to "competitor" standing set forth in petitioners' complaint rests on a series of assumptions—that petitioners "compete" with the Catholic Church in the political sphere; that the Church's tax-exempt status necessarily gives it "financial and political advantages" in that area; and that "an advantage granted to one competitor automatically constitutes a handicap to the others" (C.A. App. 18). These claims do not allege a concrete, personal injury; they merely state argumentatively that petitioners "suffer[] in some indefinite way in common" (*Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923)) with every participant in the political process who does not share the Church's views. As the court of appeals correctly noted, petitioners' theory of "competitor" standing "lack[s] a limiting principle"; it could be invoked by "any spectator who support[s] a given side in public debate" (Pet. App. 25a).[5]

In essence, what petitioners argue is that whenever someone receives any money or avoids an expense—for example, by means of a tax benefit—that infusion of funds necessarily injures its competitors, and the

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[5] The dissent in the court of appeals states (Pet. App. 29a-31a) that the petitioners that are tax-exempt organizations should be differentiated from other taxpayers in this regard because they abide by the statutory restrictions that come with their tax-exempt status. But their tax-exempt status does not change the nature of the "competitive" injury that these petitioners allege, which is the same as that alleged by any other abortion rights advocate in the political arena—namely, that it is unfair to allow the Church to use tax-exempt contributions to participate in political campaigns on the side that petitioners do not favor. Indeed, because these petitioners have removed themselves from the political campaign arena by receiving Section 501(c)(3) tax-exempt status, they are less injured than other participants would be by the alleged advantage conferred upon the Church in that arena.

competitors have standing to challenge the legality of the receipt or retention of funds. Even if the principles applicable to suits by commercial competitors are fully applicable to the competition in the political arena on which petitioners base their claim, however, this type of assumed injury clearly is not sufficient to satisfy the standing criteria set forth by this Court. The causal connection between an increase in a competitor's bank account and an injury to the plaintiff is too tenuous; the injury is not " 'fairly' traceable" (*Allen* v. *Wright*, 468 U.S. at 751) to the challenged government conduct.[6] The only injury on which petitioners base their claim of "competitive advocate" standing is that the Church's tax exemption allows it to receive more money than it would if the tax laws were properly enforced, and that those additional funds received by petitioners' competitor necessarily injure them in the political arena in which they compete. The decisions of this Court clearly establish that Article III requires a more direct causal relationship between a palpable injury suffered by

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[6] Indeed, the logical implications of the plaintiffs' theory are so far-reaching that, if adopted, it would dramatically subvert the limitations of Article III. Competing organizations, whether or not tax-exempt, presumably could sue to revoke the tax exemption of a civic league, labor union, or business league (see I.R.C. § 501(c)(4), (5), and (6)). Outside the specific area of tax exemptions, a businessman presumably could sue the government claiming that the IRS had been too generous in allowing his competitor to take a particular deduction. Or, even outside the tax area, any government action that redounded to the financial benefit of a competitor might be challenged by a third party—for example, a competitor might claim that the government had been too lenient in imposing an administrative fine on another company for certain environmental or safety violations.

the plaintiffs and the challenged conduct of the defendants.[7]

Moreover, an injury can confer standing only if it "fairly can be traced to the challenged action of the defendant, and not * * * [to] the independent action of some third party not before the court" and if it "is likely to be redressed by a favorable decision" (*Eastern Kentucky*, 426 U.S. at 38, 41-42; see *Allen* v. *Wright*, 468 U.S. at 751, 753 n.19). In this voter context, the essence of a claim of cognizable injury at the hands of the federal defendants therefore must be that the electoral fortunes of causes or candidates that petitioners support are being harmed by the existence of the Church's tax exemption and, concomitantly, that the harm would be remedied if the exemption were revoked. But, as even the district court acknowledged (Pet. App. 54a-55a, 79a), the Church's tax exemption does not have that kind of direct effect on electoral results. As was the case in *Eastern Kentucky* (see 426 U.S. at 42-43), it is purely speculative whether a change in the Church's tax status would lead to any significant change in the level of contributions made to the Church or in the nature of the Church's activities. And even if it would, it is even more uncertain whether those changes would have any palpable effect on the success at the polls of candidates whom petitioners favor. Petitioners' contention simply fails to establish the nexus required by Article III between the alleged injury and the challenged conduct; the success of their

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[7] See *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (injury in fact not established by allegation by commercial travel agents that tax-exempt status of charitable organizations offering travel programs created "unfair competitive atmosphere").

political cause hinges fundamentally on the "independent action[s] of * * * third part[ies] not before the court" (*Eastern Kentucky*, 426 U.S. at 42). See also *Allen* v. *Wright*, 468 U.S. at 758; *Winpisinger* v. *Watson*, 628 F.2d 133, 139 (D.C. Cir.), cert. denied, 466 U.S. 929 (1980).[8]

b. The claim that the petitioners who are clergy members have "Establishment Clause" standing (Pet. 28-33) to challenge the government's favorable treatment of another religious entity also fails to allege a judicially cognizable injury. The ability of the clergy petitioners to teach and minister to their congregations is not affected by the Church's tax exemption and would not be enhanced by the relief they seek. The gist of this allegation of injury, as set forth in their affidavits, is that their religious mission and values are "demeaned" and "denigrated" by the tax-exempt status accorded to the Church (C.A. App. 53, 55, 59, 62, 66). But that sort of claim can be made by any litigant who alleges that he is discomfited by government action that does not directly af-

[8] Petitioners make no adequate response to these shortcomings of their complaint. They merely assert that the Church's alleged ability to conduct political activity with tax-deductible funds automatically creates a "distortion of the political process" and "the necessity of fighting the abortion rights battle on an uneven playing field" (Pet. 21). Similarly, the dissent in the court of appeals stated that an allegation that the advocacy organization petitioners are at a disadvantage "competing in the arena of public advocacy" is itself "sufficient to permit the claim of law violation to be litigated" (Pet. App. 30a). Those statements cannot be correct; a mere allegation that the Church receives more favorable treatment than petitioners at the hands of the government is not enough to support standing. Rather, a cognizable injury in the political arena requires that the actions of the defendants have some concrete effect on electoral results or legislative initiatives in which petitioners have a direct interest.

fect him. This Court has consistently rejected such a basis for standing, whether couched as "stigmatic" injury (*Allen* v. *Wright*, 468 U.S. at 753-756) or as "psychological" distress (*Valley Forge*, 454 U.S. at 485-486).[9]

Contrary to petitioners' suggestion (Pet. 28-30), there is no justification for departing from the basic principles of standing simply because their complaint alleges that the government has violated the Establishment Clause. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), an Establishment Clause challenge to Bible reading in the public schools, this Court observed that "[i]t goes without saying that the laws and practices here can be challenged only by persons having standing to complain," *i.e.*, persons "directly affected by the laws and practices against which their complaints are directed" (*id.* at 224 n.9). Thus, the plaintiffs in *Schempp*, who were students in those schools, had standing, "not because their complaint rested on the Establishment Clause[,] * * * but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to

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[9] Apparently recognizing the weaknesses of their "denigration" claim, petitioners now disavow an intent to found standing on their status as "clergy *qua* clergy" (Pet. 32 n.10). Rather, they urge that the government "subsidy" assertedly granted to "the partisan political activities of the Catholic Church" interferes with the clergy petitioners' "mobiliz[ing] the resources of their congregations * * * in competition with another religion" (Pet. 31, 32-33). This formulation apparently tries to import the elements of petitioners' "competitive advocate" claim, with all of its severe defects (see pp. 14-18, *supra*), into a context (differences among particular religions) where the concept of competitive injury is quite out of place.

avoid them" (*Valley Forge*, 454 U.S. at 487 n.22). The clergy plaintiffs here are in no position to allege a comparable element of personal injury. Like the plaintiffs in *Valley Forge*, who also held strong views concerning the separation of church and state, they lack Article III standing because they have failed to identify "any personal injury suffered by them *as a consequence* of the alleged constitutional error" (454 U.S. at 485).[10]

3. Petitioners' claim of standing also falls within this Court's admonition "counsel[ing] against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen* v. *Wright*, 468 U.S. at 761). See also *Valley Forge*, 454 U.S. at 474-475. As in *Allen*, petitioners seek to compel the Executive Branch to undertake a nationwide review of the activities of a tax-exempt organization in order to determine whether it continues to qualify for exemption. But that is an enforcement matter generally committed to the authority of the Secretary. To allow petitioners to maintain such a suit would place the courts in the

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[10] Petitioners' assertion (Pet. 15-20; see pp. 9-10, *supra*) that the underlying issues they seek to have litigated carry "national significance" does not enhance their standing claim. As this Court noted in *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968), standing cannot be justified, in the absence of personal injury, on the basis of the "issues [a plaintiff] wishes to have adjudicated." This Court has emphatically rejected the notion that "the Art. III burdens diminish as the 'importance' of the claim on the merits increases"; there is "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Valley Forge*, 454 U.S. at 484.

position of assuming the "amorphous [task of] general supervision of the operations of government" (*United States* v. *Richardson*, 418 U.S. at 192 (Powell, J., concurring)), and acting as "virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). Moreover, a suit to compel an agency to undertake a specific enforcement inquiry is particularly unsuitable for judicial resolution because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).[11]

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[11] The administration of the tax laws presents a particularly strong case for refusal by the courts to hear a claim like that being pressed by petitioners because such a claim intrudes into a detailed structure erected by Congress to govern tax enforcement. Congress has delegated "the administration and enforcement of" the tax laws exclusively to the Secretary and the Commissioner (I.R.C. § 7801(a)), including the power to "prescribe all needful rules and regulations for the enforcement of" those laws (I.R.C. § 7805(a)). Congress has reserved to itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system. I.R.C. §§ 8001-8023. At the same time, Congress has established precisely defined channels for the adjudication of tax disputes initiated by private parties—proceedings in the Tax Court to redetermine deficiencies (I.R.C. §§ 6212, 6213), refund suits in the district courts or the Claims Court (I.R.C. §§ 6532, 7422; 28 U.S.C. 1346, 1491 (1982 & Supp. V 1987)), and, in limited circumstances, declaratory judgment actions, *e.g.*, by an organization seeking recognition of its own tax-exempt status under Section 501(c)(3) (I.R.C. § 7428). Apart from these avenues of relief, Congress has precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining

The facts of this case graphically illustrate the mischief that would flow from conferring standing on persons such as petitioners to challenge the tax exemption of a third party. Although petitioners are not directly affected by the Church's tax exemption, they seek to have the district court conduct a nationwide review of the IRS's administration and enforcement of Section 501(c)(3), an inquiry that would intrude into the sensitive internal workings of both the government and the Roman Catholic Church. Petitioners would have the district court substitute its judgment for the enforcement judgment of the IRS by reviewing the internal affairs of a multitude of organizations falling under the "umbrella" exemption given to the USCC to determine whether they engage in more political activity than their tax-exempt status permits. Moreover, this inquiry would likely touch upon confidential tax return information collected by the IRS and could well result in constitutional controversy over efforts to obtain Church documents and to take testimony of Church officials. Such a judicial undertaking cannot properly be required, or justified, on behalf of litigants whose own tax liability is unaffected by the administrative action they seek to challenge.[12]

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the assessment or collection of any tax" (I.R.C. § 7421(a)), and has barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. 2201 (1982 & Supp. V 1987)). This structure reflects a deliberate judgment that the vigor of the government's enforcement of the tax laws is generally not a matter for litigation instituted by private parties. In particular, Congress has determined that the invocation of judicial examination of the validity of a particular organization's tax exemption is the prerogative only of the government and the organization in question, not of third parties.

[12] As a practical matter, petitioners cannot obtain final relief in this lawsuit, even if they were to prevail entirely on

Indeed, this lawsuit well illustrates the concern expressed by this Court over cases raising "questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100. Petitioners are essentially seeking to exercise control over the Executive Branch's allocation of its law enforcement responsibilities, not to obtain a binding resolution of a specific legal question in which they have a cognizable interest. As this Court stated in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders' " (468 U.S. at 756, quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).[13]

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all their contentions on the merits. The Church was long ago dismissed as a party from this suit. If the district court were to enter an order directing the federal respondents to withdraw the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action under Section 7428 of the Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in the district court. Because the Church is not a party to the underlying litigation here, the outcome of this lawsuit would have no res judicata or collateral estoppel effect in later litigation. Far from ending the matter, a ruling here in petitioners' favor would not resolve the validity of the Church's tax exemption; it would only act as a catalyst to further litigation in another forum.

[13] There is no reason for the Court to hold this case pending the resolution of *Lujan* v. *National Wildlife Federation*, cert. granted, 110 S. Ct. 834 (1990). Although *Lujan* presents a standing question, it is quite different from the one presented here. *Lujan* involves a challenge to formal government actions that are subject to review under the Administrative Procedure Act, 5 U.S.C. 702; the question is whether, because

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the allegations of injury are so tenuous, the particular plaintiff is the proper party to bring suit. However *Lujan* is resolved, its outcome should have no effect on the question presented here—whether petitioners have standing to challenge the government's alleged failure to live up to its enforcement responsibilities by revoking the tax exemption of a third party.

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